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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 184

JAMES F. NANGLE, Judge of the Circuit Court
of the City of St. Louis,
Petitioner,

vs.

STATE OF MISSOURI, at the Relation of J. E. Taylor,
Attorney General of the State of Missouri,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

and

BRIEF IN SUPPORT THEREOF.

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IN THE

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STATE OF MISSOURI, at the Relation of J. E. Taylor,
Attorney General of the State of Missouri,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Missouri to review the judgment of said Court making absolute its provisional rule in prohibition previously rendered in the cause therein pending, being number 41,564, wherein your petitioner was respondent and the State of Missouri, at the relation of J. E. Taylor, Attorney General, was relator.

A certified transcript of the record in said case, including the proceedings and opinion in the said Supreme Court of Missouri, has been filed in this Court.

OPINION BELOW.

The opinion of the Court below is reported at 227 S. W. (2d) 655, and for convenience is printed in an appendix to the brief filed with this petition.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In order to familiarize the Court with all of the facts preceding the present petition for a writ of certiorari filed in this Court, petitioner does desire to set out herein all of the matters and facts leading up to the judgment here sought to be reviewed. Prior to the early part of 1945, and for a long period of time, the Southwestern Bell Telephone Company, a Missouri corporation, had furnished to the Pioneer News Service, Inc., certain telephone service and means of communication. In the early part of 1945 the said telephone company served upon Pioneer News a notice to the effect that such telephone service and other means of communication which was then being furnished to Pioneer News would be discontinued as of a designated subsequent date. Upon receipt of such notification, Pioneer News filed with the Public Service Commission of the State of Missouri, a complaint in which it set forth the notice which it had received from the telephone company and contended that no lawful reason existed for the removal or discontinuance of the said telephone service. The Public Service Commission thereupon ordered a hearing to be held between the said Pioneer News and the said telephone company on the issues raised by the news service's complaint. At the conclusion of this hearing and after the submission of these issues to the said Commission, the Commission issued its report and order (R. 36)

wherein it stated, among other things, that there had been a complete failure of proof by the telephone company in its attempt to show that the telephone service, which was then being furnished by the company to the news service, was being used in violation of the law, and that no substantial evidence was presented before the Commission to corroborate the contentions of the telephone company. This hearing was held in the proper manner and as provided by the procedure set forth in the statutes creating the said Public Service Commission (R. 36). The Commission thus concluded its summary of the evidence which had been presented to it and stated that it had "no choice as the record stands before us but to order the telephone company to continue its service to complainant until such time as complainant may voluntarily relinquish the service or if on another or similar proceeding it may be shown that the company is justified in discontinuing the service because of unlawful use" (R. 43). This hearing thus held before the Public Service Commission followed the filing by Pioneer News of its complaint and the subsequent service of notice by the Commission upon the telephone company of the pendency of such complaint and the issuance of an order directed to the telephone company requiring it to show cause why the complaint of the said news service should not be satisfied. All parties concerned with the issues thus raised were notified of the pendency of the complaint and all parties were further permitted to be present at this hearing and to present testimony and evidence in their behalf. This hearing was held on the 16th day of July, 1945, and the Commission's ruling ordering the continuation of the furnishing of the utility's services was rendered on the 4th day of October, 1945.

Thereupon the telephone company, complying with the order of the Public Service Commission and without taking an appeal from such order, continued to supply and furnish the news service with telephone service and with its other means of communication which Pioneer News had

enjoyed prior to 1945. Such service was continued until the month of February, 1947, at which time the telephone company received from the Governor and the Attorney General of the State of Missouri a certain telegram (R. 22) which asserted that the telephone company was furnishing private telephone circuits between its customer, Pioneer News Service, Inc., and various other persons and that these telephone circuits were being used to communicate information for the purpose of violating the laws of the State of Missouri and the ordinances of the City of St. Louis. The telegram further referred the telephone company to its tariff regulation (R. 20) which authorized the public utility to discontinue service to any person "upon notice from any official charged with the enforcement of the law stating that such service is being used as an instrumentality to violate the law." The telegram therefore requested the company to discontinue such telephone service immediately and in accordance with this communication the telephone company proceeded to disconnect and to discontinue the furnishing of all of such telephone service and means of communication previously furnished to Pioneer News. The telephone company in so doing relied solely on its said tariff regulation and on the telegram which it had received pursuant thereto, and the telephone company in so acting assumed that the mere receipt of the telegram as set out above brought into operation the tariff regulation which is quoted above. The telephone company did not at that time submit any issues or change of circumstances to the Public Service Commission nor, indeed, was any hearing or notice or opportunity to be present offered or furnished to Pioneer News Service, Inc., prior to the perfunctory removal of the telephone service. Nor, indeed, did the telegram as received by the telephone company allege any change of circumstances or conditions from those which had existed at the time the Commission had ordered a hearing upon Pioneer News' complaint and had rendered its decision in 1945.

Thereafter, the said Pioneer News Service, Inc., filed in the Circuit Court of the City of St. Louis, State of Missouri, on March 18, 1949, a petition for a writ of mandatory injunction (R. 14) directed against the said Southwestern Bell Telephone Company in which it was alleged among other things that the said telephone company had for a long time prior thereto furnished certain equipment and means of communication to the news service. The said petition, filed before this petitioner, further alleged that the said telephone company had the exclusive control and management of all means of communication by telephone available for the area and vicinity in which the news service operated and that such means of communication were avaliable from no source other than the particular telephone company. It further stated that as set out above its telephone service had been disconnected and discontinued and that it was being deprived of the means of operating its business and was thus being irreparably injured by the discontinuance of such service. It, therefore, prayed that the Circuit Court issue a temporary mandatory injunction directed against the telephone company and ordering it to restore such telephone service and means of communication as it had previously furnished to Pioneer News, and the petition further prayed for an award for damages which had been sustained by reason of the alleged wrongful removal of the telephone service.

Shortly thereafter the State of Missouri by its Attorney General, J. E. Taylor, filed in the said cause a motion for leave to intervene on the grounds, among other things, that the actions of the Governor and the Attorney General of the State of Missouri were being challenged therein and that the action therein pending involved the interest of the State of Missouri. This petitioner did permit such intervention of the State of Missouri on the 6th day of April, 1949. Simultaneously with the filing of its motion for leave to intervene the State of Missouri also filed a Motion

to Dismiss the said petition of the Pioneer News Service, Inc. (R. 25), contending that the telegram which had previously been issued by the Governor and the Attorney General in 1947 did constitute sufficient authority for the removal of the telephone service by the telephone company and alleging further that if the telephone service was ordered reinstalled it was the purpose of the news service to use such communications for the purpose of violating the laws of the State of Missouri. The Southwestern Bell Telephone Company also filed its Return to the order to show cause and a Motion to Dismiss, in which it referred the Circuit Court to its tariff regulation and based its prior removal of the communication service on the receipt of such telegram as set out above. It further requested the Court to dismiss the suit on the ground that the Circuit Court of the City of St. Louis was without jurisdiction to hear the same or to make any orders in reference thereto.

Oral and written argument were thereupon had before the said Circuit Court in relation to the said Motion to Dismiss and Return to the order to show cause. The basis for the telephone company's contentions was again referred to and its tariff regulation and telegram which it had received in 1947 from the Governor and the Attorney General were presented to the Court. On behalf of the news service, the records of the hearing before the Public Service Commission in 1945 and the subsequent ruling of the Commission ordering the continuance of the phone service were likewise submitted to the Court. At the conclusion of these oral and written arguments and after this petitioner had considered all the issues presented to it, the Court issued certain "Findings of Fact, Conclusions of Law, Judgment and Decree" (R. 26), in which the Court reviewed the prior events which had preceded the filing of the instant suit in which the Court found that the Missouri Public Service Commission had after a full and complete hearing required the Southwestern Bell Tele-

phone Company to continue its telephone service to the Pioneer News Service until such time as the Pioneer News Service might voluntarily relinquish such service or until such time as the Public Service Commission might upon a similar and appropriate proceeding rule otherwise. In its Findings the Court further held that the telephone company did receive the telegram in question in 1947 and had on the basis of such telegram and on the basis of its tariff regulation removed the telephone service from Pioneer News. In its Conclusions of Law the Court further held that jurisdiction on the ultimate issues involved in the dispute between the news service and the telephone company was properly in the Missouri Public Service Commission, but that the Court had reviewed the laws in setting up and establishing the Public Service Commission and designating its powers and duties and had concluded from such review that the Public Service Commission did not have the power or the authority as given to it by the Legislature to enter or enforce a temporary or pendente lite order and that the Pioneer News Service was, therefore, without complete and adequate relief to establish its rights or to maintain its status quo as per the prior order of the Public Service Commission without the intervention of a court of equity. The Court further held that, it being a court of equity, it had sufficient power and could provide such temporary relief or relief pendente lite as the Commission was not authorized to render. It, therefore, entered its ruling requiring the restoration by the telephone company of telephonic service to the news service, "until such time as said defendant may be authorized to discontinue said service by order of the Public Service Commission in any apropriate proceedings or until further order of this Court."

The above Findings and conclusions of the Circuit Court were issued on April 12, 1949, and on the third day following the issuance of such order, the Missouri Public Service

Commission issued a Preliminary Report and Order (R. 29) in which the Commission stated that it had received from the Attorney General of Missouri a copy of the order of the Circuit Court of St. Louis and that it was aware of the tariff regulation of the Southwestern Bell Telephone Company and that, further, it had become aware of the telegram issued in 1947. The Commission further stated that it was assuming that all of the matters set forth in the telegram were true and that the charge of violation of law was to be considered correct. It further stated that a user of telephone service had no vested right therein, that such service was merely a privilege and, therefore, the Commission was authorizing the telephone company to discontinue immediately such telephone service as it was then providing to the news service. This order of the Commission was issued in a completely ex parte manner without any semblance of a hearing, without the filing of a complaint or petition by any private party, corporation or, indeed, by the Commission itself, and without any notification or notice to appear to any parties who might become bound by its decision as to the pendency of any investigation or any filing of a complaint or of any opportunity to defend any accusations or charges lodged with the Commission. Furthermore, this Report and Order stated that it "shall be in full force and effect beyond and after this date and the Secretary to this Commission shall forthwith serve certified copies hereof upon all interested parties in the manner provided by law." Thus, as will be argued later in the Brief, said order was issued in such manner as to foreclose any possible appeal or resort to any other body or Court for the review of such order on any basis whatsoever.

Pioneer News Service on the 16th day of April, 1949, filed in the Petitioner's Court a "Motion for Additional Order" in which it set out the April 15th order of the Public Service Commission and alleged to the Court that

the order was made without hearing or notice and without giving to the news service an opportunity to present any defense to the charges which the Commission held to be true and correct as charged. The motion thus prayed that the Court issue an additional order requiring the telephone company to continue its telephone service as per the Court's original order, and subsequent thereto, to-wit, on the 18th day of April, 1949 (R. 34) the Court issued an order affirming its original temporary injunction and stated that the 1945 order of the Commission, ordering the continuance of the communication service, had never been challenged by a Motion for Rehearing or by the filing of a new complaint before the Commission and that it had further never been changed, modified or abrogated in accordance with the very order of the Commission in 1945. The Court held further that the Preliminary Report and Order which had been issued by the Commission several days earlier was lacking in any basis of due process, was issued totally ex parte, with no notice whatever to any interested party as to its pendency and without any semblance of a hearing, and that, therefore, it constituted a deprivation of the rights and property of the news service without due process of law and in violation of the Constitutions of the United States and of the State of Missouri. Of its own motion, the Court on the 25th day of April, 1949, amended its order affirming the temporary injunction by stating that the original injunction was to be "affirmed until the further order of this Court or until the said original order or decision of said Commission may be changed or modified by said Commission, in accordance with the provisions of Sections 5601-5686 and 5689, R. S. Mo. 1939." In so ruling, the Court stated that the 1945 order of the Public Service Commission had never been changed in any way in accordance with the wording of the Commission's own order in 1945 or in any other way by the methods provided by the statutes creating the Public

Service Commission in regard to the review of its orders, by motion for rehearing or appeal or by the filing of a complaint with the Commission itself.

On April 18, 1949, the news service appeared specially before the Missouri Public Service Commission and moved the Commission to set aside and dissolve its order of April 15, 1949, stating, among other things, that it had been issued ex parte and had no basis in law, but this motion was overruled and denied on the next day following the presentation of such motion.

Subsequent thereto the State of Missouri and the telephone company filed in this Petitioner's Court certain motions to dissolve all orders of injunction which the Court had issued (R. 48) and after due hearing and argument these motions were overruled by the Court on the 17th day of March, 1949.

Thereafter, the State of Missouri at the relation of its Attorney General filed in the Supreme Court of the State of Missouri an application for a preliminary writ of prohibition (R. 1) to restrain this petitioner from taking any further action in the suit between the Pioneer News Service, Inc., and the Southwestern Bell Telephone Company and to order the dissolving of the orders which had been issued by the Circuit Court. The preliminary writ of prohibition was granted by the said Supreme Court (R. 66) and due Return thereto (R. 67) was made by this petitioner through the real party in interest, the Pioneer News Service. Oral and written argument were thereupon presented to the Supreme Court and after submission of the cause, the Court issued its decision (R. 82) on the 13th day of February, 1950, making its provisional writ in prohibition absolute and stating that the Circuit Court of the City of St. Louis was completely without jurisdiction to enter any order whatever in the cause therein pending before it. The opinion went on to state

that all jurisdiction over the matter in dispute in this cause was exclusively in the Public Service Commission of the State of Missouri and that, though the Commission was not a court and had no power to render judicial decisions, yet the Commission itself could resort to the Courts to enforce its order. It thus asserted and ruled that the only relief available to the Pioneer News Service, Inc., was resort to a state agency which had already ruled in an ex parte fashion on the very matters here in dispute and which had permitted for a period of two years a violation of its 1945 order on the same issues. The opinion, indeed, states that the Commission had made no effort since February, 1947, to enforce its 1945 decision. The Court also stated in regard to the April 15, 1949 order of the Commission, that such order could have been appealed from and that in any event the Court need not decide the validity or constitutionality of the said April 15th order. Furthermore, although the Court agreed in effect that the telegram from the Governor and the Attorney General of the State of Missouri was not binding on the telephone company and did not constitute authority for the removal of the telephone service and that the telephone company could well have gone to the Commission for a modification of this Commission's 1945 order, yet it held that the action of the telephone company in removing the telephone service was not improper thereby and that the Courts of this State had no jurisdiction whatever to enforce any right so affected by an action of a public utility.

Within the time prescribed by law this petitioner filed a motion for a rehearing in the said Circuit Court praying the Court to set aside its decision and opinion in this case (R. 89) on the grounds, inter alia, that the Court had failed to consider the lack of power in the Missouri Public Service Commission to render or enforce temporary relief pending determination of any ultimate issues before

it and the lack of relief which is afforded to the Pioneer News Service, Inc., when the Public Service Commission permitted a violation of its own order for a period of two years and failed to take any action to seek the enforcement of its order, that the decision in this case was in conflict with a prior decision of that Court, that the Court had failed to pass upon the Commission's order of April 15, 1949, as to its validity by reason of the procedural and substantive defects and by reason of its total lack of any of the elements of due process in violation of the statutes of the State of Missouri and of the Constitutions of the United States and of the State of Missouri, that the Court had failed to consider the questions raised by the petitioner in regard to the fact that the said order of the Commission was not appealable to any reviewing body or Court, and that the Court had erred in authorizing and encouraging the removal of the rights and property of the Pioneer News Service, Inc., without any due process of law, without equal protection of the law and without any adequate remedy or relief.

The foregoing Motion for Rehearing was overruled by the Supreme Court (R. 109) on the 13th day of March, 1950, and thereafter this petitioner filed with the said Supreme Court an application for stay of mandate (R. 109), in which it indicated its intention to apply to this honorable Court for the issuance of a writ of certiorari to review the decision of the said Supreme Court of Missouri and stated the basis for applying for such writ. It further prayed the Court for an order staying the mandate entered upon the ruling of the Court and the overruling of the petitioner's Motion for Rehearing. Such application was granted by the Supreme Court of Missouri on the 16th day of March, 1950 (R. 110).

JURISDICTION.

The Supreme Court of Missouri rendered its decision on the 13th day of February, 1950, making absolute its provisional rule in prohibition which had previously been issued. A motion for rehearing pursuant to the rules of the Supreme Court of Missouri was timely filed on February 28, 1950 (R. 89). This motion was overruled on March 13, 1950 (R. 109), at which time the said decision and judgment became final. The Supreme Court of Missouri has stayed the issuance of its mandate pending this proceeding in this Court (R. 110). This petition for the issuance of a writ of certiorari is filed within the time provided by Title 28, United States Code, Section 2101 (c). Jurisdiction to review the judgment of the Supreme Court of Missouri is conferred on this Court by Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED.

1. Does the decision of the Supreme Court of Missouri in this case, by holding that exclusive jurisdiction of the matters involved is in the Public Service Commission of Missouri and that the petitioner has no jurisdiction in this cause, have the effect of leaving Pioneer News Service without any adequate remedy and so deprive it of property without due process of law?

2. May a party be deprived of his right to a service furnished by a public utility, which constitutes an essential element of his business, without notification of the pendency of any charges or allegation against him, without notification of the pendency of a hearing and without the opportunity to be present and to defend such charges and allegations?

3. Does the removal of service by a public utility upon mere notification by a law enforcement officer that such

service is being used in violation of the law constitute a deprivation of property without due process of law?

4. Does the removal of the telephone service of a business by a public utility acting by virtue of a telegram from a law enforcement officer to the effect that the service is being used to furnish information to customers who are violating the law and concluding that the furnishing of such information is also a violation of the law, where there is no statute or adjudication that such use of the service is a violation of the law, constitute a deprivation of due process of law?

5. Does the Supreme Court of Missouri rule correctly that speedy review may be had from the order of the Public Service Commission of Missouri when the very nature of the order issued by the Commission completely nullifies and deprives the affected party of any possibility of an appeal, in violation of the constitutional guaranties of due process of law and of the equal protection of the law?

6. Does the order of the Missouri Public Service Commission of April 15, 1949, which is disregarded and undisturbed by the decision of the Supreme Court of Missouri, deprive Pioneer News Service of the equal protection of the law by reason of its foreclosing any right to appeal from its order?

7. Is an affected party deprived of due process of law and equal protection of the law by reason of the fact, as evidenced by the opinion of the Supreme Court of Missouri, that the Public Service Commission cannot render equitable relief or render relief pendente lite and by reason of the further fact that under the decision of the state court in this case, no court of the State of Missouri can render immediate or interlocutory equitable relief pending a determination and a ruling by the Public Service Commission?

8. Does the fact that the decision rendered by the Supreme Court of Missouri holds that exclusive jurisdiction over the matters in dispute in this case is within the Public Service Commission of Missouri deprive a party of due process of law when the said Public Service Commission has already ruled in an ex parte fashion and with no notice or hearing on the merits of the matters in dispute?

9. Does the fact that the Supreme Court of Missouri has ruled in its opinion that the Pioneer News Service may resort to the Commission for relief herein deprive Pioneer News of due process of law when the Public Service Commission of Missouri has for a period of two years, contra to the statutes creating the said Public Service Commission, permitted its prior order to be violated without any attempt at the enforcement of such order?

10. Does the fact that the Public Service Commission of the State of Missouri cannot issue a judicial decision, as evidenced by the opinion of the Supreme Court of Missouri, operate to deprive a party subject to the jurisdiction of the Commission of an essential element of due process of law, when the said commission attempts to act in a judicial capacity?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Supreme Court of Missouri in this cause deprives Pioneer News Service of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, in that the effect of this decision is to leave the said news service without any adequate remedy with which to protect its right to continued telephone service, and that the further effect of the decision is to leave binding and undisturbed an order of the Public Service Commission of the State of Missouri, which in essence authorizes the deprivation of the news service's property without any semblance

of notice or an opportunity to be heard, and indeed without permitting an appeal from such authorization and ruling. In so ruling, the Supreme Court has decided that a party has no right whatever to the furnishing of service provided by a public utility, which utility provides the only such service available to the party; that such service may arbitrarily, capriciously, and without conformity with any of the elements of due process be summarily discontinued and removed, and that the party affected by such action shall have no remedy either by appeal from the authorization for such action, or by resort to a tribunal for some interlocutory relief pending proper action by the parties to have the discontinuance of such service properly approved or disapproved.

2. The decision of the Supreme Court of Missouri in this case sanctions the removal of telephone service and means of communication by a public utility upon mere notification by a law enforcement officer or agency that in its opinion the service is being used to furnish information to persons who are allegedly using such information for the purpose of violating the law, whereas, there are no decisions, statutes or adjudicated cases holding that the service here involved or the use to which it is allegedly being put constitutes a violation of the law. In so holding the Supreme Court of Missouri authorizes and indeed encourages the removal of such service in direct violation of the guaranties set out in the Fourteenth Amendment of the Constitution of the United States by denying a party affected by such action of any of its rights to be informed of any charges or proceedings instituted against it, of any right to be confronted with such charges, and of any right to be present when such charges are presented or to be heard in defense of such charges. In so ruling, the Supreme Court of Missouri has disregarded all of the decisions of this Court in which said guaranties have been protected and in which the component and essential parts

of due process of law have been expressly defined, and to the contrary upholds a mode of action which is repugnant to any conception of substantial justice and fair and orderly procedure.

3. The decision of the Supreme Court of Missouri in this cause, if permitted to stand, decides an important Federal question with respect to guaranties under the Constitution of the United States, which it is in the public interest to have settled by this Court, that is, whether a State may deprive to a party the right to an essential element of its business, without first permitting such party to be heard on its defenses to any alleged charges, and may further deprive such party of resort to a court of the State in order to secure equitable and injunctive relief pending a wrongful removal of such property. This question is one of great importance not only in the State of Missouri, but as well in every one of the United States, and will, if the decision of the lower Court be not reviewed by this Court, be interpreted by the State of Missouri as well as by other States to warrant arbitrary and police-state type deprivation and confiscation of the property and effects of its inhabitants, without any semblance of protection to the rights and privileges of parties so affected. It is in the public's interest, as well as in the interest of law enforcement officials of the various States, that this Court rule authoritatively whether such action as has been authorized in this case, namely, the removal of telephone service from the only source available, by reason of monopolistic control of such service, and without any notice or an opportunity to be heard upon the reasons for such threatened removal or discontinuance, violates the guaranties set out in the Constitution of the United States, as upheld on so many occasions by the decisions of this Court.

4. The decision of the Supreme Court of Missouri in this cause has the effect of depriving Pioneer News Service of

the equal protection of the law, as guaranteed in the Fourteenth Amendment of the Constitution of the United States. The Missouri Court in this case failed to set aside the order of the Public Service Commission of April 15, 1949, which order was issued without any notice or hearing afforded to the affected parties, and further held that the Circuit Court of the City of St. Louis had no jurisdiction, however limited, to grant any injunctive relief to protect the rights of any affected parties pending a full determination on the merits between the parties litigant in respect to the continued furnishing and service of the telephone service and means of communication in question. In so doing, the Supreme Court of Missouri singled out this case, and ruled directly contra to the rulings of the Missouri Courts in cases involving similar situations and circumstances. It ruled contra to its decision in the case of State ex rel. St. Louis-San Francisco Ry. Co. v. Russell, 219 S. W. (2d) 340, wherein the limited jurisdiction of the same Circuit Court of the City of St. Louis was upheld, in a case where the said Circuit Court did grant injunctive relief to protect certain parties, pending a determination of jurisdictional disputes in the Mediation Board under the Railway Labor Act, although admitting, as in the present case, that final jurisdiction to determine the said issues was within the said Mediation Board. The State Court also ruled contrary to a prior state decision, wherein it was stated that where the Missouri Public Service Commission has arbitrarily issued a Report and Order without any notice or opportunity to be heard, it is the duty of the Court to set aside such order. It was so ruled in the case of State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S. W. (2d) 1069. And in its decision the Court similarly did not rule in accordance with its original holding as set out in the case of State ex inf. McKittrick v. American Colony Insurance Company, 336 Mo. 406, 80 S. W. (2d) 876, to the effect that a construction of the statutes to

warrant denial of injunctive relief pending a determination of a dispute before an administrative agency constitutes a deprivation of property without due process of law and in violation of Constitutional requirements.

In so ruling and rendering its decision, the Supreme Court of Missouri has misapplied the state law as it applied to the parties litigant in this cause, and has denied to the said parties the equal protection of the laws under a case of similar circumstances.

5. The decision of the Supreme Court of Missouri herein is in conflict with and disregards prior decisions of this Court. The case of Truax v. Corrigan, 257 U. S. 312, held that a business is a property right and that a law which operates to make lawful any unauthorized interference with such business deprives the owner of the business of due process of law, and cannot be held valid under the Fourteenth Amendment of the Constitution of the United States. It further held that the granting or withholding of equitable relief in any class of cases must, under the equal protection of the laws clause of the United States Constitution be so exercised as not to grant equitable relief to one and to deny it to others under like circumstances and in the same territorial jurisdiction. It is obvious as set forth in the preceding paragraph that the parties affected by the removal of the telephonic service in this case were deprived of the equitable relief, which has under the laws of the State of Missouri and under judicial authority been granted to others in similar situation and circumstance.

The decision of the lower Court in this case is in further conflict with the case of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U. S. 673, wherein this Court held that a State Court, being the Supreme Court of Missouri in that case, cannot render a judgment which has the practical effect of depriving a party of property without affording

ing the party at any time an opportunity to be heard in its defense. In that case, the Court held the denial of equitable relief on the ground that resort must be had to an administrative remedy is improper and a denial of due process of law where such administrative remedy was never and is not now available to the affected party. There is striking similarity between the cited case and the one presently before this Court. Here, too, the affected party, Pioneer News Service, has been denied equitable relief as a result of the ruling by the Supreme Court of Missouri to the effect that the St. Louis Circuit Court does not have jurisdiction. And it has been denied such relief on the ground that resort must be had to the Public Service Commission. Resort to such administrative remedy is indeed unavailable when the same Commission has indeed already ruled in an ex parte fashion, and with no possibility of appeal, on the very matter in dispute, that is, the continued furnishing of telephone service, and thus the affected party is left without any adequate relief whatever by reason of state law under a construction of the state judiciary, all in violation of the Constitutional guaranties of the United States.

6. The decision in this case is further in conflict with another decision of this Court, that of Porter v. Investors' Syndicate, 286 U. S. 461. It was held in that case that it is a denial of due process of law for a state to refuse equitable relief from an order of an administrative agency until such time as the administrative action is reviewed or corrected in a manner prescribed by law. In the present case, the injunctive relief was denied to Pioneer News Service, though it was conceded by the Circuit Court of St. Louis that ultimate jurisdiction of the matters in issue therein were properly within the Public Service Commission of Missouri, and even though the Circuit Court held in its order that its injunctive relief was to remain in effect only until such time as a prior order of

the very Public Service Commission was reviewed or modified or corrected in some respect, and in appropriate proceedings for that purpose. By so ruling, the decision here sought to be reviewed is probably in conflict with the foregoing and other applicable decisions of this Court.

7. The Supreme Court of Missouri in this cause, by judicial interpretation and construction, has deprived the Pioneer News Service of the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, for the further reason that it has left undisturbed the order of the Public Service Commission of April 15, 1949, which authorized the Southwestern Bell Telephone Company to remove the telephone service which it was then furnishing to Pioneer News Service, Inc. The statutory law of the State of Missouri, with reference to the decisions of the said Public Service Commission, provides for review from these decisions by appeal to certain state Courts. Prior and conditional to the taking of such appeal, however, a motion for rehearing must be filed with the Commission prior to the effective date of its order. In the instant case, the order of the Commission was made effective immediately, without the permission of any time for the filing of the requisite motion for rehearing, without which an appeal would be impossible. The Supreme Court of Missouri in its decision left such order of the Commission undisturbed and it remains in effect even to this date, thus depriving the news service of the statutory right to appeal in this case. The decision therefore is violative of such Constitutional guaranty which states that the law must be applied in like manner to all persons in similar situations and in the same territorial jurisdiction, and to the contrary singles out this instance to deprive the affected party of rights given to others, in direct contravention of the principle of equal protection of the law.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari to review the said judgment of the Supreme Court of the State of Missouri in the case of State of Missouri, at the relation of J. E. Taylor, Attorney General of the State of Missouri, Relator, v. James F. Nangle, Judge of the Circuit Court of the City of St. Louis, Respondent, be granted, to the end that the decision and judgment of said Supreme Court of Missouri in said cause may be reviewed by this Court as provided by law, that upon such review the judgment of the Supreme Court of Missouri be reversed, and that your petitioner have such other and further relief in the premises as may be meet, just and proper.

MORRIS A. SHENKER,
St. Louis, Missouri,
Attorney for Petitioner.

BRIEF

In Support of Petition for Writ of Certiorari.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3). The judgment of the Supreme Court of Missouri making its provisional rule in prohibition absolute was entered on February 13, 1950, and an order overruling a timely motion for rehearing was entered on March 13, 1950. The petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri is filed within the time provided in Title 28, United States Code, Section 2101 (c).

STATEMENT OF THE CASE.

The statement of the case has already been stated in the preceding petition under Summary Statement of the Matter Involved (pp. 2-12), which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

The Supreme Court of Missouri erred:

1. In holding that the petitioner was without any jurisdiction whatever to render any relief in this cause, on the ground that exclusive jurisdiction in such matters is in the Missouri Public Service Commission.

2. In holding that the petitioner was without jurisdiction to place the parties litigant in the status quo until such time as the matter in dispute might be heard and determined by the Public Service Commission.

3. In ruling that Pioneer News Service could have obtained interlocutory relief pending a decision on the merits, by the roundabout method of application to the Public Service Commission and the Commission's resort to the Courts to enforce its orders.

4. In holding that the order of the petitioner does more than maintain the parties in their status quo, but rather reaches back more than two years, and in so doing that the petitioner thus usurps the power of the Public Service Commission.

5. In holding that the petitioner erred in relying on and referring to the order of the Public Service Commission entered in 1945 in an action between the same parties litigant, and involving the same subject matter, namely, the furnishing of telephone service to Pioneer News Service by the Southwestern Bell Telephone Company.

6. In holding that the petitioner erred in giving reliance to the said 1945 order of the Commission for the reason that there had been no attempt to have such order enforced either by Pioneer News or by the Commission itself, though the order had not been complied with since February, 1947.

7. In ruling that the issues involved in the case of State ex rel. St. Louis-San Francisco Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2d) 340, were different from those involved in the present case, and that in the Russell case the Circuit Court of the City of St. Louis did have limited jurisdiction to render equitable relief pending action by an administrative agency whereas in the present case such limited jurisdiction was not present in the same Court.

8. In failing to consider and in disregarding the validity or invalidity of the order of the Missouri Public Service Commission of April 15, 1949, in regard to the authorization of the removal of the telephone service, and in failing to rule on the fact that such order was issued in an entirely ex parte fashion, without any notice of its pendency and with no opportunity to any parties to be heard in support of or in opposition to the Commission's contemplated report and order.

9. In ruling that speedy review could have been had from the April 15, 1949 order of the Public Service Commission by the Circuit Court of Cole County, Missouri, when as a matter of fact the order of the Commission was so drafted as to preclude any possibility of an appeal by an aggrieved party.

10. In holding that the Southwestern Bell Telephone Company acted properly in removing the telephones in question upon the receipt of the telegram from the Governor and Attorney General of Missouri in 1947 to the effect that it was the opinion of the said officials that the telephone service involved was being used in violation of the law.

11. In holding that although the said telegram did not constitute full and complete authority for the removal of the telephone service by the telephone company, yet this fact did not invalidate the removal of the service and that

the Circuit Court of St. Louis did not have authority or jurisdiction to prohibit the violation of the prior ruling of the Commission until such time as the Commission might rule in appropriate proceedings on the issues involved.

12. In holding that prohibition was a proper remedy in this case, although the writ is of its nature prohibitive and not corrective, and this petitioner was not threatening to take any further action in this cause, but had to the contrary expressly stated that it had invoked merely a limited jurisdiction pending further action by the Public Service Commission.

13. In holding that the petitioner may be prohibited from the enforcement of the temporary injunction issued by it, when the issue of enforcement of the injunction had never been before the Court, and there had been no violation of its terms, or any attempt or threat by the Court to enforce its order.

14. In failing to consider the fact that the ruling of the Commission in 1945 ordering the continuation of the telephone service to the Pioneer News Service was in full force and effect and binding upon all Courts of the State of Missouri at the time that the original petition for mandatory injunction in this cause was filed in the Court of this petitioner.

15. In failing to consider the fact that the effect of its ruling making its provisional writ of prohibition absolute was to leave Pioneer News Service without any adequate remedy for the redress of its grievances.

16. In failing to consider the fact that its ruling sanctioned the removal of the telephone service in question in an arbitrary manner and in complete disregard of the Constitutional guaranty of due process of law and the equal protection of the law.

ARGUMENT.

I.

The decision of the Supreme Court of Missouri in this cause has the effect of leaving the affected party without any adequate remedy for the redress of its grievances, and constitutes a deprivation of the property of such party without due process of law, and in violation of its Constitutional guaranties, since no Court nor administrative agency can render the type of relief required to protect the substantial property rights here involved.

The Supreme Court of Missouri in this cause has decided a substantial question relating to the guaranties with which parties are endowed by virtue of the Fourteenth Amendment of the Constitution of the United States. As set out in the Summary Statement of the Matter Involved of the Petition herein, the Pioneer News Service is engaged under its Articles of Incorporation in the dissemination of news and other types of information. A very necessary item in the operation of its business is the use of telephonic service for the dissemination of its information. For a long period of time this information has been supplied to Pioneer News by its only available source, the Southwestern Bell Telephone Company. As set out further in the Summary Statement, Pioneer News applied to the Court of this petitioner for the issuance of a mandatory injunction, claiming among other things that its telephone service had been wrongfully discontinued and that it was being deprived of such service without any reason. In its Judgment and Decree this petitioner ruled that there was no question but that ultimate jurisdiction over such disputes as may arise between a public utility and one of its customers was properly within the Public Service Commission of Missouri, but that due to the fact that the Statutes of the State of Missouri did not

provide for the granting of any equitable relief pending a determination by the Commission of any dispute before it, this petitioner did have the limited jurisdiction, sitting in equity, to supply such deficiency and to grant such equitable relief until such time as the Commission might rule on such matter (R. 26). The petitioner at the same time noted that the Commission had actually ruled in 1945 (R. 36) in a hearing between the same parties, namely, Pioneer News Service and the Southwestern Bell Telephone Company, to the effect that it had not been shown to the Commission that the telephone service furnished was being used in the violation of the law, and the Commission therefore ordered that the service be continued until such time as the subscriber might voluntarily relinquish the service or until such time as the Commission might be convinced otherwise in a similar and appropriate proceeding. There had of course never been any such similar proceeding before the Commission. To the contrary, the telephone company without any resort to the Commission arbitrarily removed the telephones in question, basing its action upon the mere receipt of a telegram from the Governor and Attorney General of Missouri. The Supreme Court has now ruled that despite the foregoing the petitioner was not vested with such power as to grant the mere temporary relief which was extended in this cause, to-wit, the restoration of the telephone service until such time as the Commission would in accordance with the laws establishing the said Commission rule otherwise or take some formal action in the premises. In so ruling, the petitioner was merely ruling in accordance with the very order of the Commission itself in 1945, wherein the Commission upheld the continuation of such service, and in accordance with the state statute which held that:

"Every order or decision of the commission shall of its own force take effect and become operative

thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein, or until changed or abrogated by the Commission. . . ."

Revised Statutes of Missouri, 1939, Section 5601.

It appears quite evident therefore that the effect of the decision here sought to be reviewed is to leave Pioneer News Service in the position of having no remedy at all to prevent the totally unauthorized removal of its telephone service in actual violation of the order of the Public Service Commission. To the contrary, the state Supreme Court has stated that although the Commission itself may not grant equitable or interlocutory relief pending a determination of any matter before it, yet it (the Commission) can go into the courts of the state and under its creating statutes seek the issuance of an injunctive order to compel compliance with its orders. It is true that the Statutes of Missouri prescribe that when the Commission shall be of the opinion that a telephone company is violating its order, it shall direct its general counsel to commence a proceeding in any circuit court of the state to have such action stopped or prevented either by mandamus or injunction (Revised Statutes of Missouri, 1939, Section 5683). Under Sections 5669 and 5667 of said Statutes, the Commission does similarly have extensive powers with respect to the operation of public utilities within the state and may make investigation relating to compliance with or violation of its orders and rulings. On the basis of this, the Supreme Court of Missouri has ruled that Pioneer News could and should have applied to the said Commission to have obtained the type of relief which it sought in the court of this petitioner. Let us examine the facts to determine if this would have been feasible, if indeed possible. The original ruling of the Commission ordering the continuation of the service occurred in 1945. The removal of the telephones on the basis of the telegram occurred in

1947. Thus, for a period of two years, that is, from the removal of the telephones until the institution of the cause in the Circuit Court of St. Louis in 1949, the Commission permitted its order to be absolutely and completely violated, and made no attempt whatever in the manner prescribed by law to prevent or stop such violation. This was the case, in spite of the requirement of the state statute which said that the commission "shall make such inquiry in regard to any act done or omitted to be done by any telegraph corporation or telephone corporation in violation of any order or decision of the commission" (Revised Statutes of Missouri, 1939, Section 5669). Thus, even though it was the explicit duty of the Commission to investigate such matters and to seek to have such violations enjoined, the Commission sat idly by and took no action whatever, but rather permitted the very flagrant violation of its own order.

Aside from the foregoing, however, there is another matter which would make resort to the Public Service Commission utterly useless and unavailing, and of such nature that the Supreme Court of Missouri should have upheld the jurisdiction of the petitioner so that Pioneer News Service would not be deprived of its property without due process of law. At the time of the rendering of the opinion below, the Supreme Court of Missouri was well aware, as evidenced by its opinion (R. 88), that the Commission had on April 15, 1949, in an ex parte order authorized the removal of the telephone service by the telephone company. The validity of this order and its violation of basic Constitutional right will be discussed in a later section of this Argument. At any rate, it was obvious to the Court and undisputed by any party that such order of the Commission was issued without any notice of the pendency of any investigation and without offering the affected parties an opportunity to be heard either prior or subsequent to the entering of such order. Certainly, therefore, resort to a Commission which has, without hearing any evidence,

and without compliance with the very basic elements of due process, issued an order directly contra to its order of 1945 rendered after full and complete hearing would have been to no avail. Certainly, therefore, the Commissioners were prejudiced to such an extent that any argument which could possibly have been made to the Commission by Pioneer News would have been unsuccessful. Although it has been held in the case of Montana Power Co. v. Public Service Commission of Montana, 12 F. Supp. 946, that prejudice on the part of the Commission will not ordinarily disqualify such Commission so as to make its action invalid, it is obvious that the facts of that case differ to a great extent from those of the instant case. For there the ground of the alleged prejudice was that the particular Commissioner had prior to his election made certain political campaign speeches in which he had made promises as to his actions with regard to utility rates if he were elected. Certainly such a nebulous and vague reference to his intentions could not have any bearing on a subsequent particular case or hearing, and certainly differs by a very great deal from the type of situation with which we are here confronted. In the present case, we have the situation where the Commission has actually ruled and given an opinion, not on a vague or distant theory or proposition, but indeed on the very matter which the Supreme Court of Missouri would have the parties affected by its decision put before the Commission once again. On April 15, 1949, the Public Service Commission ruled that the Southwestern Bell Telephone Company was authorized to remove the telephone service from the premises of the Pioneer News Service. This ruling was given without notice or an opportunity to be heard. Obviously, then, to return to the Commission now, in accordance with the decision rendered in the court below, would merely be time consuming and of no practical effect.

Thus the news service finds itself in the peculiar position of being told that its only available relief and only

resort is to apply for relief to an administrative agency which concededly does not have the power to render equitable relief, which has for a period of over two years permitted its own orders to be violated, and which has in fact already ruled on the very matters over which the Supreme Court has stated this petitioner has no jurisdiction.

In the above respect the instant case bears a striking similarity to that of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U. S. 673. That case was similarly a certiorari proceeding to review a decision of the Missouri Supreme Court. The petitioner had sued in a Missouri court to enjoin the State Treasurer from collecting a certain part of assessed taxes, alleging the said assessment to be void. The Missouri Supreme Court affirmed a dismissal of the suit, on the ground that relief could have been had by timely application to the State Tax Commission at any time prior to the delivery of the tax books to the State Auditor. It was thus held, in spite of the fact that earlier Missouri cases had held that the State Tax Commission was not empowered to grant such relief as was here sought. At the time of the Missouri Supreme Court's ruling, however, the tax books had already been delivered, and it was therefore too late to complain to the Tax Commission. On petitioner's application, this Court thereupon allowed certiorari and reversed the Missouri Court's ruling, stating that the **practical effect** of the State Court's decision is to deprive the petitioner of due process of law without affording it at any time an opportunity to be heard. It stated that the petitioner could not be denied relief on the basis of the newly found powers of the Tax Commission, and that if the State judgment was permitted to stand, petitioner would be deprived of its property without ever having had an opportunity to defend against such exaction. So in the instant case, the Supreme Court says that the only remedy available to the Pioneer News Service is not in the Circuit Court of the State but in the Public

Service Commission which has already ruled on the issues involved and indeed in such a manner as to preclude any possibility of appeal from its order, as will be discussed later in this Argument. This is the practical effect of the decision of the lower Court in this case, and it is petitioner's contention that such decision leaves Pioneer News in such a situation as to be actually remediless and to be deprived of its property without any semblance of due process and without ever having been permitted the opportunity to be heard in its defense. Such denial of due process may as well be accomplished by the judicial branch of government as by the legislative. For, as stated in the Brinkerhoff case:

> "If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. Ettor v. Tacoma, 228 U. S. 148. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U. S. 450) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

This, then, is the practical effect of the decision in this case, and leaves the party aggrieved by the decision without any adequate remedy. Relief by interlocutory equitable injunction to restrain the removal of such telephone service in the county where the service is actually being furnished is the only practical relief to which the news service could possibly have applied under the circumstance. Indeed, the petitioner in this case has never attempted to interfere with the powers of the Missouri Public Service Commission. State law as interpreted by prior judicial decisions had determined that the Commission did

not have the power to render equitable relief, to declare any rule in equity, or to enforce its own decisions. State ex rel. United Rys. Co. of St. Louis v. Public Service Commission of Missouri, 270 Mo. 429, 192 S. W. 958; Atchison, T. & S. F. Ry. Co. v. Public Service Commission of Missouri, 192 S. W. 460; American Petroleum Exchange v. Public Service Commission, 172 S. W. (2d) 952, in which latter case it was definitely held that the Commission could not determine damages, award pecuniary relief, abate a nuisance, nor render any type of equitable relief. On the basis of these decisions, petitioner was aware of the limited powers of the Commission and was further aware, since it was part of the evidence before him (R. 36), of the prior order of the Commission in 1945 ordering the continued furnishing of the telephone service until the Commission might rule on a similar hearing or proceeding. With these things in mind, the petitioner merely supplemented the 1945 order of the Commission which, unless overruled or modified, had binding effect in the courts of the State of Missouri. As such it had become a binding and conclusive order by virtue of Section 5694 of the Revised Statutes of Missouri, 1939, and as such was to be respected by the Courts of this State. And by its order petitioner, instead of hampering the orderly administration of justice, was seeking to assist in the same by ruling in complete accord with the binding decision of the Commission, which decision had never been appealed, modified, or abrogated in any way. The petitioner was therefore merely retaining the parties in their respective positions under the orders and decision of the Commission, and was seeking to enjoin a violation of the Commission's very order.

A case decided by this Court, that of Porter v. Investors' Syndicate, 286 U. S. 461, is further corroboration of the contention herein raised by petitioner that the denial of equitable relief in such circumstances is violative of the

due process guaranty as set out in the Constitution of the United States. That case involved an appeal from a decree of a Federal District Court, enjoining the enforcement of a state official's order. Although this Court ruled that the plaintiff had failed to exhaust an administrative remedy, it did state that where a state statute provides a complaining party with equitable relief or a stay of execution pending a review or a correction of state administrative action, there was no deprivation of due process of law, even though the statute attributed final and binding character to the administrative decision. Pacific Live Stock v. Lewis, 241 U. S. 440. And that, to the contrary, where either the plain provisions of the statute or the decisions of the state courts interpreting the statute precluded any such relief or stay of execution pending such review or correction of the administrative ruling, the aggrieved party is not afforded due process of law. Thus, in the present instance, if the statutes of the State of Missouri as construed by the Supreme Court of the state have the effect of depriving a party of any immediate or interlocutory relief pending a final determination of a matter properly before the Public Service Commission, the party is certainly deprived of his property either by the Commission itself or by one violating the Commission's decision in contravention to the principles of due process of law. Pioneer News Service is therefore, if the present decision is permitted to stand, deprived of the very essential part of its business, its means of communication, without having ever been heard on the violation of the order of the Commission by the telephone company in 1947, or on the 1949 order of the Commission, from which there is no right to review by reason of the manner in which the said order of the Commission is drafted. It is urged therefore that this situation is such a brazen deprivation of its property rights without due process of law as to warrant the granting of

the instant writ for the purpose of reviewing the merit of the decision of the lower Court.

II.

The decision of the Supreme Court of Missouri in this cause has the effect of depriving Pioneer News Service of the equal protection of the law, as evidenced by prior decisions of this Court and of the Courts of the State of Missouri, in contravention to the guaranties as set out by the Fourteenth Amendment of the Constitution of the United States.

It is the further contention of the petitioner that the Supreme Court of Missouri has decided the cause below in a manner in direct conflict with rulings prescribed by it in former and similar cases, and contra to principles set out in prior cases decided in this court, with the net result being that the Pioneer News Service has been singled out as not being entitled to its rights and protection of the courts in its attempt to operate its business in an orderly and proper manner. As set out in the prior section of this Argument, the Missouri Supreme Court has ruled that the petitioner is without jurisdiction to render any relief, no matter how temporary or interlocutory, in this cause or to maintain the parties in their status quo pending determination in the Public Service Commission of the disputes between Pioneer News Service and the Southwestern Bell Telephone Company. It has ruled further that sole jurisdiction therein is in the Public Service Commission, and as stated supra, this is in effect depriving Pioneer News of any adequate remedy for the redress of its grievances. In so ruling the Supreme Court of Missouri has not only sanctioned the deprivation of the news service's property without due process of law, but has also ruled in such a way as to deprive the said company of the equal protection of the law. Equal pro-

tection of the law, as bestowed by the Fourteenth Amendment of the Constitution of the United States, has been defined in part by this Court as giving to all "like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts" (Truax v. Corrigan, 257 U. S. 312). With such definition in mind, we may look at the present decision here sought to be reviewed and it becomes evident that the parties affected by this decision have not been afforded this basic guaranty, but to the contrary that the court has singled out the parties herein and denied to them alone the protection and recourse to the judicial tribunals which is given and has been given to persons in similar circumstances and in similar situations. The Supreme Court of Missouri has said here in effect that Pioneer News Service cannot obtain the type of relief it seeks before the Commission, and that further it can resort to no court of the state, even for the type of relief which would protect its property and its business until such time as some other procedure might be invoked.

The legislators of the State of Missouri have created a very definite and precise procedure with respect to the granting of injunctive relief, both of a temporary and a permanent nature. The statutes applying thereto are set out and enumerated at Sections 1661-1683 of the Revised Statutes of Missouri, 1939. At Section 1661, it is stated that:

> "Injunctions may be granted by the circuit court or judge thereof in vacation, and by the county court or any two judges thereof in vacation."

Section 1664 states that a temporary injunction may be granted to restrain an act of a defendant when it appears that the relief as warranted by plaintiff's petition shall consist of restraining the commission or continuance of

some act of the defendant. In the sections following the statutes set out with particularity the various steps to be taken in the obtaining of injunctive relief, the posting of an indemnity bond, and subsequent dissolution of the injunction. Thus, in the ordinary course of events, a party is entitled, upon a showing that he is entitled to injunctive relief, and that a continuance of the acts which a defendant is committing or threatening to commit will result in great and irreparable injury to the plaintiff, to a decree of the court, restraining such action or threats of the defendant until such time as the full cause on its merits may be determined or, after a full hearing, permanently restraining the commission of the allegedly injurious acts. Such is the type of situation which was presented to the petitioner in the instant cause. Pioneer News filed in the court of this petitioner a petition for a mandatory injunction, stating that the service which had been furnished by the telephone company was a necessary part of the plaintiff's business, that the defendant telephone company's services were the only such services available to the plaintiff, and that such service had been wrongfully discontinued. It stated further that unless such services were ordered reinstated, the plaintiff would suffer great and irreparable damage and would be unable to carry on its lawful business. Upon such a petition and a showing of facts on the hearing held upon plaintiff's request for the issuance of a temporary injunction pending the final determination of the issues, did the petitioner issue its Judgment and Decree (R. 26). This is the very type of situation contemplated by the legislators in the creation of the statutes above referred to for the protection of the rights and privileges of parties by a means other than an award of mere pecuniary damages. Such relief as rendered by a court of equity is meant to be speedy and of immediate effect for the immediate protection of parties finding themselves in unusual circumstances. But in this case, the

highest court of the state has said that such statutes shall not apply to the facts of this cause, and that the plaintiff in the original suit shall not be permitted to invoke the aid of a court of equity for the redress of its alleged wrongs, but shall be permitted only to seek the alleged relief of a state administrative agency which itself has no power to render such relief as to be beneficial to the plaintiff in any way, and which agency has indeed already ruled in an ex parte fashion on the very issues which would be raised by resorting to the Commission. And indeed, during all of such time, the plaintiff would be forced to remain without the use of its telephone service, without the matters which constitute a very essential part of its business, all in direct violation of the very order of the Public Service Commission granted after a full hearing in 1945 ordering the continuation of such service. Such constitutes certainly a very startling and unusual procedure for the administration of justice for the equal protection of all and with discrimination toward none.

Not only are the statutes of the State of Missouri corroborative of petitioner's contention in this regard, but the very decisions of the state courts would seem to uphold this position, and are further illustrative of the fact that in other situations of like circumstance such relief as is here sought is held properly granted to parties seeking the aid of courts of equity. In the Missouri case of State ex inf. McKittrick v. American Colony Ins. Co., 336 Mo. 406, 80 S. W. (2d) 876, it was held that a denial of injunctive relief may well constitute a deprivation of due process in violation of the requirements of both the Federal and State Constitutions. There, in a statutory proceeding to review an order of the state superintendent of insurance which had refused an application of certain fire insurance companies for increased rates, the companies sought injunctive relief pending a determination of the cause, contending that denial of the increased rate was confiscatory. The

Missouri Supreme Court, in discussing this question, stated that relief pendente lite in this manner was not limited to Federal Courts, and that the Circuit Court of the State did have the power to grant the interlocutory injunctive relief pending determination of the allegedly confiscatory nature of the rates in question. It said that if the Federal Courts have the power to grant injunctive relief pendente lite on a preliminary showing that the denial of an increased rate is confiscatory (as evidenced by such cases as Porter v. Investors' Syndicate, 286 U. S. 461; Pacific Telephone and Telegraph Co. v. Kuykendall, 265 U. S. 196; Prendergast v. New York Telephone Co., 262 U. S. 43), the State Circuit Court could do the same. Thus, in that case the denial of the type of injunctive relief which was sought in the present case was held to be violative of the principles of due process of law, and the granting of the injunctive remedy as set out by the statutes of the State sanctioned. It thus becomes evident that the denial of such relief in the present case is an arbitrary restriction placed on this set of circumstances alone and denies the equal protection of the law.

Another instance or situation which indicates the unusual action of the court in this case is a case of striking similarity, that of State ex rel. St. Louis-S. F. Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2d) 340, which was decided by the same Supreme Court of Missouri less than a year prior to the decision in the cause presently before this Court. In that case certain colored employees of the defendant railroad filed suit in the Circuit Court of St. Louis asking for injunctive relief against the railroad to restrain the reclassification of the employees' job functions, and other matter relative to certain employment practices. The Circuit Court did grant temporary relief, by a temporary injunction, and thereupon the railroad sought prohibition in the Supreme Court of Missouri, contending that jurisdiction to determine these matters was

properly within the Mediation Board established under the Railway Labor Act of the Federal government. The Supreme Court of Missouri held in effect that the points at issue were in the nature of a jurisdictional dispute between various employees of the railroad, and that therefore exclusive jurisdiction over the issues involved therein was properly within the said Mediation Board, and that therefore the St. Louis Circuit Court was without jurisdiction to determine these matters. The Court did not stop there, however, but went on to say that the St. Louis Circuit Court did have the limited jurisdiction over the matter so as to warrant a ruling of the Court maintaining the status quo of the parties and enjoining the railroad from taking away from the said employees their current job functions pending proper determination of the matter by the Mediation Board. It therefore upheld so much of the lower court's order and jurisdiction as restrained such action on the part of the railroad. In the case presently before this Court, petitioner admitted in its Judgment and Decree (R. 26) that it could not finally determine the issues pending between the news service and the telephone company. To the contrary, the extent of its order went merely to maintain the position of the parties litigant as per the proper and regularly issued orders of the Public Service Commission in 1945 and until such Commission on appropriate proceeding might rule otherwise. The last cited case and its relevancy to the issues herein were argued to the court below both in petitioner's brief and in its Motion for Rehearing. The Missouri Supreme Court attempted to distinguish this case on the ground that in the Russell case, the Circuit Court was merely maintaining the parties in their status quo, whereas in the present case petitioner was usurping the powers of the Commission and ordering the restoration of a service which the news service did not have at the time of the institution of the present suit. Needless to say, however, the implication which is thereby derived, that is, that if Pioneer News had

filed the instant suit in 1947, the Circuit Court would have had jurisdiction to render equitable relief, whereas because the suit is filed in 1949, the Circuit Court has no such jurisdiction, is untenable. A court is either with or without jurisdiction over a particular matter. It cannot suddenly acquire or suddenly be deprived of jurisdiction, merely because of the time involved. If petitioner had jurisdiction, in spite of the Missouri Public Service Commission, to render injunctive relief in 1947, it certainly has the same in 1949, and the ruling of the Court in the Russell case, which is not overruled in the present case, should apply as well to the Pioneer News Service as to the parties involved in the Russell case. To hold otherwise is certainly to deprive Pioneer News of the equal protection of the law, as it is applied to situations of like circumstances.

Moreover, as will be discussed later, the order of the Commission on April 15, 1949, was issued without any notice or opportunity to be heard and in an ex parte manner. That equal protection of the law was similarly deprived to the parties herein by the Missouri Court's failure to set such order aside and by the Court ruling in effect that such order shall remain binding is further attested by the earlier Missouri case of State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S. W. (2d) 1069. In that case a Report and Order of the Commission had similarly been issued without notice or hearing, and the Court therein held it was the duty of the Court to set aside such order on the ground that it was arbitrarily issued, and that the Commission had arbitrarily exercised the power given to it. In the present case, to the contrary, such order of the Commission was quickly by-passed, the Court stating there was no necessity to rule upon the same. By so doing, however, this order was left standing and binding with no possibility for its review or correction, and with the news service having never been heard on the matters therein contained.

Perhaps the most striking illustration of the significance of the court's ruling in this case may be found by comparison of this ruling with that of this Court in the case of Truax v. Corrigan, 257 U. S. 312. In that case, decided by this Court in 1921, the issue was whether the plaintiff owners of a certain business were entitled to equitable relief from the action of former employees by peaceful picketing. The Arizona courts had denied such equitable relief, and the cause came to this Court on error to review the decree of the Arizona Supreme Court. In Arizona, too, there were statutes relative to the general granting of equitable relief and injunctions. In addition to these statutes, however, there was another which stated that no restraining order or injunction was to be issued by any court of the state to prohibit any person from terminating employment or from advising others by peaceful means to abstain from working in a certain place. It was contended that such statute, if it made the defendants' acts lawful, contravened the Fourteenth Amendment to the Constitution of the United States. With this contention this Court agreed. It held plaintiffs' business was a property right and that free access to such place of business was incident to such right. Of the statute which denied injunctive relief in the employer-employee disputes, and of its relation to the principle of equal protection of the law, the Court said:

> "Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

It was thus held to be a denial of equal protection to grant equitable relief to one person and to deny it to another, and

further that there should be equal access to the courts for the redress of grievances, and that an invasion of ordinary business rights may not be considered unlawful when committed by some persons and lawful when committed by others. Thus, the mere fact that the acts were committed by ex-employees could not deprive the owners of the business of their right to equitable relief against such injurious acts of the defendants.

Is not the effect of the decision in the present case just as arbitrary as the special Arizona statute in the Truax case? The Missouri Supreme Court has ruled, in spite of the general injunctive relief statutes of the State of Missouri, and in spite of its prior decisions to the contrary, that Pioneer News Service shall be deprived of the right to equitable relief, and shall indeed be left without any remedy whatever. Might it not as well have ruled that insurance companies and railroad employees shall be entitled to certain equitable relief, no matter how limited, but that distributors and disseminators of news information shall be deprived of such remedy? The classification in this instance is just so arbitrary and capricious, and it is urged that the action of the court herein deprived the party aggrieved by its decision of all substance of the principle of the equal protection of the law, in violation of clear Constitutional guaranties, and that this Court should therefore review the judgment below and properly determine the issues involved.

III.

The decision of the Supreme Court of Missouri in this cause has the effect of sanctioning and encouraging the removal of telephone service by the telephone company in violation of the rights of the news service upon the mere receipt of notification from a law enforcement officer that in the opinion of such officer such service is being used in the violation of the law.

In ruling on the instant cause, the lower court has stated that not only may the Pioneer News Service not apply to a court of equity for the granting of equitable relief to have its rights protected, but it has also decided a question of great importance both in the State of Missouri and in the other various states. This is a question which has never been authoritatively decided in this Court, namely, whether or not it is a violation of the due process of law requirement of the United States Constitution for a public utility to discontinue service to its subscriber without notice or a hearing, but upon the mere notification by a law enforcement officer to the effect that the service being furnished by the utility to the particular subscriber is, in the opinion of the officer, being used in the violation of some law or ordinance. The Supreme Court of Missouri has ruled in this case that the removal of telephone service by a telephone company upon the receipt of such notification does not invalidate such removal or render such discontinuance unlawful. It is, of course, the contention of this petitioner that a removal such as was effected in this case is totally unwarranted, totally foreign to all orderly administration of the law, and a deprivation of a party's property without due process of law. This matter was argued at length before the Missouri Supreme Court, and although the Court said in its opinion that the receipt of the telegram from the Governor and Attorney General of Missouri did not constitute full and complete authority for the removal of the telephone service, yet it did further hold, strangely enough, that such removal was not thereby totally unauthorized and not of such nature as to deprive the affected parties of its rights under the law. Let us then examine the telegram received in this case, and the procedure invoked for the discontinuance of the furnishing of the communication service.

In 1945, after a full and complete hearing, the Missouri Public Service Commission issued a Report and order

(R. 36), wherein it found that the business conducted by Pioneer News Service was lawful and in violation of no law of the State of Missouri. It further found that the telephone company had not shown to the satisfaction of the Commission that Pioneer News was knowingly using its telephones in furtherance of a violation of the law. It therefore restrained the company from removing its service. In 1947, Governor Phil M. Donnelly and Attorney General J. E. Taylor of Missouri sent to the telephone company a telegram (R. 22) in which they stated, although there had been no intervening hearing before the Commission or anywhere else, that it was a matter of record that Pioneer News Service was using its telephones as an instrumentality in the violation of the law. They therefore requested that such telephone service be immediately discontinued. At the time of the receipt of this telegram, the telephone company had on file with the Public Service Commission a certain tariff regulation (R. 20) which stated that:

> "The Telephone Company shall be authorized to discontinue service upon notice from any official charged with the enforcement of the law stating that such service is being used as an instrumentality to violate the law."

It was on the basis of this regulation that the telephone company did actually remove the telephone service immediately upon receipt of the telegram as above set out. This was done although the Commission had ruled in 1945 at a time when the same tariff regulation was on file that the telephone service should not be removed unless by voluntary action on the part of the customer or until the further order of the Commission on appropriate proceeding. Upon receipt of the telegram in question the company did not return to the Commission by the filing of a complaint or otherwise, but took it upon itself to act upon its own without approval from any authorized

agency and without any attempt whatever at a substantiation of any of the charges set out in the telegram. This action was in effect approved by the Supreme Court of Missouri and it is herein strongly urged that the failure of the Court to set such action aside constitutes a condonation of this procedure, and further constitutes a violation of the subscriber's Constitutional rights.

It is elementary that the term "due process of law" requires that there be at some stage of the proceedings an adequate notice to the party to be affected by the result of the proceeding and an opportunity to such affected party to be present and to hear the charges made against it and to be heard in its defense. To permit a law enforcement officer, who is not in himself a legislator or a member of the judiciary to assume legislative and judicial powers and to order that a person be summarily deprived of his right to the service furnished by a public utility, which service is exclusively under the control of such utility and which is also an essential element of the person's means of livelihood, is to grant to such party extraordinary power, indeed. Authorities of this Court are abundant to the effect that there can be no due process unless there is a notice and hearing extended to all parties who may be aggrieved by the action to be taken. The Missouri Supreme Court has held in its opinion on the one hand that all jurisdiction over the furnishing or discontinuance of telephone service to various customers is exclusively in the Public Service Commission, and on the other hand it has said that the telephone company need not have resorted to the Commission prior to its removal of the telephones in 1947. It was sufficient, we are told, for the company to rely on a mere notification from two state officers, and arbitrarily to remove the telephone service without regard to any rights of the subscriber and without affording the subscriber even a chance to state its case against the charges which had been placed against it. In the case of Rogers

v. Peck, 199 U. S. 425, this Court stated that the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an opportunity to defend himself in the prosecution. There was in the instant case not even notice that the telephones were to be removed in order to permit the news service ample time within which to seek the protective arm of the Courts to restrain such action. The removal of the telephones was arbitrary in every sense of the word, and cannot be condoned under any explanation or disguise of the true circumstances. Nor, indeed, should it be overlooked and thus condoned by the highest court of the state, as has been done herein. The effect of the decision rendered in this case is to render a judgment against the news service, stating that it is not entitled to the telephone service in question, without ever giving the news service an opportunity to be heard, since in the final analysis the Court has ruled as argued above that it may not resort to any other type of relief from the effect of the action taken by the telephone company. Such action, without any notice or hearing whatever, is certainly contra to the decisions of this Court in such cases as Pennoyer v. Neff, 95 U. S. 714; Boswell v. Otis, 50 U. S. 336, and Noble v. Union River Logging R. Co., 147 U. S. 165. The Fourteenth Amendment to the Constitution of the United States does not place an undue restriction on the powers of the States, for as stated by this Court in the case of American Land Co. v. Zeiss, 219 U. S. 47:

> ". . . the Fourteenth Amendment does not operate to deprive the States of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really

within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

The telephone company in this case, in attempting to justify its action in the removal of the telephone service, relies strongly on its tariff regulation referred to above. It is urged that such tariff regulation, if it be upheld, does constitute state authority for "arbitrary and unreasonable exertions of power," and that such state authority is "so unreasonable and unjust as to impair or destroy fundamental rights."

Moreover, even were we to assume that the facts alleged in the foregoing telegram were true, that is to say, that the Pioneer News Service was furnishing information to persons using the same in the alleged violation of the law, yet there is no adjudicated decision that such acts constitute a violation of the laws of the State of Missouri. Indeed, the same Missouri Public Service Commission stated in its 1945 order (R. 41) that it had searched the Missouri statutes and decisions and had found no authority for the proposition that the dissemination of racing information was unlawful. It went on to cite various state decisions which had expressly declared such activities to constitute no violation of the law, and stated that the Pioneer News Service was clearly engaged in a lawful business.

Illustrative of the widespread importance which this matter has assumed in the various jurisdictions and of the need for an authoritative interpretation of the problem by this Court is the very recent case of Andrews v. Chesapeake and Potomac Telephone Co., 83 F. Supp. 966, which treated the same topic presently called to this Court's attention. In that case the plaintiff was notified by the defendant telephone company that on a designated date it would discontinue such telephone service as it was then furnishing to the plaintiff subscriber. It justified such removal by stat-

ing that it had received notification from the United States Attorney for the District of Columbia that the plaintiff's telephones were being used in the violation of the law, and that the United States Attorney had therefore requested the disconnecting of the service then being furnished to the plaintiff. Subsequent to the receipt of such notice the subscriber sought relief by way of a petition for a temporary injunction to restrain the threatened action of the telephone company. In reserving its ruling on the proposition advanced, the Court reviewed a tariff regulation of the Potomac Telephone Company, which regulation was to all intents and purposes identical with that of the Southwestern Bell Telephone Company in the present case. The Court recognized the necessity of proper law enforcement, but stated that it was of greater importance that the enforcement of the law be conducted in accordance with the protection and guaranties of the United States Constitution. It stated that a person of bad character is not by reason of this alone to be deprived of his right and privilege to the service of public utilities, although the utility is justified in discontinuing such service if it discovers that its services are being used directly in a particular violation of the law. Judge Holtzoff went on to state, however, that such knowledge is not to be presumed by the action of the telephone company, but rather that in such circumstances it is incumbent on the utility to show by a preponderance of the evidence the substance of the charges which it has, if any, against a particular subscriber to its services. In discussing the tariff provision the Court said that if the tariff was to be liberally construed it could not be considered valid, for a utility may not take away from a member of the public his rights to the particular service merely because it has received notification from a law enforcement official of the illegal use of the particular service. The telephone company can therefore not disregard, under the guise of action under supposedly official authority, all elements of due process as insured by the Federal Govern-

ment. To hold otherwise, it was stated in the last cited case, would be a conferring of judicial power on a law enforcement officer, and would constitute an ex parte exercise of power, in violation of due process of law and of the legal rights of the public.

Thus the matter complained of by this petitioner is not novel or peculiar to this particular set of circumstances. Rather it is obvious that such problems are arising in many situations, and that unless this Court makes some ruling in the premises we shall witness an arbitrary and ruthless assumption of power and control on the part of certain individuals without any concern of the rights of the affected parties. Certainly the exercise of power under such an invalid tariff rule should in no sense be encouraged by the Courts, especially where no relief from such action is possible in any other state administrative or judicial body, and the decision of the Supreme Court of Missouri so holding should, under the circumstances, be considered and reviewed by this Court.

IV.

The decision of the Supreme Court of Missouri herein has overlooked and thereby sanctioned, encouraged, and left binding the order of the Public Service Commission, entered on April 15, 1949, which order was rendered without any due process of law, without compliance with the applicable statutes, and without providing the affected party with an opportunity to appeal from such order.

Another very important question which has resulted from the rendering of the opinion below is the failure of the Court to give any order in respect to or to make any reference to the order of the Public Service Commission which was rendered subsequent to the entering of the petitioner's initial order granting the temporary injunction in this cause. This order (R. 29) in the nature of a Pre-

liminary Report and Order stated that it had come to the attention of the Commission that this petitioner had issued some relief in the cause pending before it and further that it had also become aware of the certain telegram which had been sent to the Southwestern Bell Telephone Company in 1947. It went on to state that it was presuming that the matters set out in the telegram were true, and was therefore making an order authorizing the telephone company to discontinue its service to Pioneer News. It is the petitioner's contention, of course, that such order was absolutely void on its face, deprived the affected parties of any of the essential element of due process of law, deprived them further of the equal protection of the law, and was issued in total disregard of the statutes setting up the Commission and enumerating the procedure to be followed in matters pending before the Commission. Such order of the Commission is therefore totally contrary to the guaranties of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of Missouri has stated in its opinion that it need not discuss the validity of this order of the Commission, since it had ruled that petitioner had no jurisdiction in the first instance to render any type of relief in this cause. In so ruling, however, the Supreme Court of Missouri has left such order undisturbed and binding upon the parties, and, even though invalid from its inception, yet in full force and effect, and, as will be presently pointed out, not reviewable.

A perusal of the pertinent sections of the Missouri Statutes concerning the Commission will indicate the very precise and orderly procedure which the Legislators have created for the purpose of the operation of the Commission's business. Section 5670 of the Revised Statutes of Missouri, 1939, states that the Commission may of its own motion make investigations as to acts done or omitted to be done by any utility under the jurisdiction of the Commission. This section also sets out the method by which

complaints may be made to the Commission, and the procedure to be followed subsequent to the filing of the complaint as to the notification of the parties concerned and the submission of the matter complained of. Section 5670 provides for certain duties of the Commission **after hearing** as to certain matters of complaint of private individuals. Section 5672 provides for orders, in relation to changes on telegraph or telephone lines, which the Commission may make **after hearing.** Section 5680 states that the Commission may require the carrying of a depreciation account by telegraph or telephone companies, if it deems the same to be necessary **after a hearing.** And Section 5686 also provides the manner of making complaint to the Commission as to any act done or omitted to be done by any persons in violation of any law or order of the Commission. This section provides for the notification of the party complained of as to the pendency of the action, and as to the time and place for the hearing. Section 5688 provides for the method of conducting hearings, the introduction of testimony, the taking of depositions, and the issuance of the Commission's order. We see therefore that the Statutes provide a very complete and detailed procedure for the handling of matters before the Commission and for the rendering of its decisions. A glance at the order of the Commission issued in this case will show that none of these statutory requirements or methods of procedure have been complied with by the Commission, and that the order of the Commission is devoid of any elements of due process, even were the statutory procedure not set out as above. Here the Commission ruled of its own motion without notification either to the news service or to the telephone company of the pendency of any investigation or hearing, or of the filing of any complaint with the Commission. Further, the Commission set no time for the receiving of testimony either in behalf of or against any proposed action or order of the administrative body. This

action was not even in accordance with the prior order of the Commission itself, for in 1945 in a dispute between the same parties and after a full and complete hearing, the Commission had ruled that the telephone service in question should be continued until such time as it might be voluntarily relinquished or "if on another and similar proceeding it may be shown that the company is justified in discontinuing the service because of unlawful use." Certainly in the present instance there was no semblance or even imitation of a "similar proceeding." The parties were not permitted to be present, no evidence was taken, and the parties were not even permitted to be represented by counsel. Certainly such procedure is contrary to the matters discussed in this Court's decision in the case of Morgan v. United States, 304 U. S. 1, wherein it was held that the right to a full hearing which is essential to the legal validity of an administrative regulation under authority entrusted by Congress to an administrative agency embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The Court further said that those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes, and to be heard upon its proposals before it issues its final command. In the present case, not only did the Commission receive no evidence, but it presumed to be true matters contained in a certain communication which at most constituted hearsay evidence, and which would probably not even have been admissible in a valid hearing before the Commission. Certainly the removal or continuance of the telephone service was a matter of sufficient importance to warrant the taking of complete and full testimony relative to the alleged charges made, and the granting of the order in the manner herein made is contrary to every sense of fair and impartial pro-

cedure. There may be certain instances where there may be a close question as to whether a certain procedure or hearing has complied with the necessary elements of due process of law. In the present case, however, there can be no question at all. The order was issued arbitrarily without any notice to Pioneer News Service of the possibility of such order and without giving it any opportunity to contest such order by disputing the charges made against it. As was said in the case of Ochoa v. Hernandez, 230 U. S. 139, the principle of due process of law has been recognized since the American Revolution as being among the safest foundations of our institutions, and that though there may be uncertainties about the exact definition of the term, it is not disputed that it prevents the taking of property from one person and giving it to another "contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." Certainly, the order here was made in complete defiance of the modes of procedure as enumerated in the statutes creating the Missouri Public Service Commission. That it was rendered without notice or hearing is obvious on its face. That it was therefore issued without due process of law cannot be seriously doubted. Petitioner does not mean to contend that by the Fourteenth Amendment, the Federal Government can dictate the mode of procedure in a particular proceeding, but as stated in the case of Simon v. Craft, 182 U. S. 427, the restriction of the Fourteenth Amendment does mean that there shall be a regular course of proceeding, in which notice is given of the nature of the claim asserted and an opportunity given to the party affected to defend against such claim.

The Supreme Court of Missouri has held below in disregarding this order of the Commission that the news service is not deprived of due process of law in that speedy review might have been had from such order of the Commission. And, without the statutory requirements which

have here been called to the Court's attention, it may well be that if there may be a hearing upon appeal from an administrative order, this would be a sufficient compliance with the guaranty of due process of law. For, indeed, it has been said in the very recent case of Ewing v. Mytinger and Casselberry, 70 S. Ct. 870, that a hearing is not required at the preliminary stage of an administrative proceeding so long as the requisite hearing is held before the final administrative order becomes effective. In that particular instance the administrative proceeding did not go as far as that of the present case, but was merely determining whether or not a judicial proceeding should be instituted. Aside from the foregoing, however, the order in the present case was so lacking in due process that it even foreclosed all possible right to appeal or review of its order contrary to the very terms of the statute. It is difficult therefore to comprehend what type of speedy relief the opinion below refers to, when it is seen that the order issued by the Commission (R. 33) was to become effective immediately and to be in full force and effect upon and after the date of its issuance. Section 5689 of the Revised Statutes of Missouri, 1939, states that after the issuance of an order or decision by the Commission any interested party shall have the right to apply for a rehearing of the matters determined therein. It goes on to state that:

> "No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or person or public utility unless such corporation or person or public utility shall have made, before the effective date of such order or decision, application to the commission for a rehearing."

It is obvious therefore that no appeal may be had from the orders of the Commission unless application for a rehearing be made before the effective date of the Commission's order. The Missouri courts, furthermore, have been

quite strict in their application of this section of the statute. For example in the case of State ex rel. Alton R. Co. v. Public Service Commission, 348 Mo. 780, 155 S. W. (2d) 149, it was held that the receipt by the Commission of an application for rehearing on the date that the order of the Commission became effective was not timely, as the above section of the Statute required that such "application" be made "before" such date, in order to permit appeal from such order. Again, in the case of State ex rel. Kansas City, Independence and Fairmount Stage Lines Co. v. Public Service Commission, 333 Mo. 544, 63 S. W. (2d) 88, it was held that a certain order of the Commission became effective on May 5, 1930, so as to require the filing of an application for a rehearing before May 5, in order that the applicant may be entitled to review of the Commission's order by the Circuit Court of the State. The filing of such application for rehearing is therefore an absolute prerequisite to the taking of an appeal from the Commission's order. Here, by the terms of the Commission's own order, the effective date of the Preliminary Report and Order was April 15, 1949, the date of the order itself. According to the terms of the order, no possibility was present for the filing of an application for rehearing or reconsideration by the aggrieved party, so that the order itself was not only invalid and unconstitutional because issued without notice to the parties concerned, without hearing or an opportunity for the presentation of evidence, but also because the order was so worded as to preclude any right to appeal from such order, as prescribed by the pertinent statutes.

The Missouri Supreme Court has held, however, that speedy review could have been had from such order, and has further disregarded the complete invalidity of such order, and the effect of its deprivation of property without due process of law. The result of the lower Court's decision, therefore, is to permit such order of the Public Serv-

ice Commission to remain binding upon all parties concerned and to remain in full force and effect without any possible opportunity for review or correction of such order. It is urged therefore that the effect of this decision is to deprive the affected parties of substantial rights afforded them under the Constitution of the United States and the decisional law rendered by this Court, and that these questions are of such import as to warrant a review and determination by this Court of the correctness of the decision below.

CONCLUSION.

It is respectfully submitted that because of the important Federal questions decided in the Supreme Court of Missouri and the effect of the decision below with respect to the rights of the affected parties under the Constitution of the United States and the pressing need for some authoritative determination by this Court of the questions stated herein, a writ of certiorari should be granted to review the said judgment of the Supreme Court of the State of Missouri.

Respectfully submitted,

MORRIS A. SHENKER,
Attorney for Petitioner.

APPENDIX.

Opinion of Supreme Court of Missouri.

In the Supreme Court of Missouri,
En Banc.

January Session, 1950.

State of Missouri at the Relation of J. E. Taylor, Attorney General of the State of Missouri,
Relator,

v.

James F. Nangle, Judge of the Circuit Court of the City of St. Louis, Missouri, Division No. 3,
Respondent.

No. 41,564.

Original prohibition to prevent the respondent circuit judge from proceeding further in a cause pending before him in the Circuit Court of the City of St. Louis, and to abate the orders heretofore made in such cause.

The cause as to which prohibition is sought was filed on March 18, 1949, by Pioneer News Service, Inc., against the Southwestern Bell Telephone Company, praying for a mandatory injunction to compel the defendant to restore telephone service to the plaintiff and for a judgment for damages in the sum of $100,000.00.

On February 5, 1947, Phil M. Donnelly, then governor, and J. E. Taylor, attorney general, of Missouri, joined in a telegram to Southwestern Bell stating that telephone service supplied by it was being used by Pioneer News to register and record bets on horse races in violation of

Section 4674 of our statutes. [All mention of statutes will refer to sections of Revised Statutes Missouri, 1939, and Mo. R. S. A.] The telegram referred to a provision in the telephone company's tariff on file with the Public Service Commission, effective September 2, 1943, authorizing the discontinuance of telephone service upon notice from any law enforcement official that such service was being used as an aid in the violation of law, and requested the telephone company to discontinue service to Pioneer News.

On February 6, 1947, the telephone company disconnected all telephones, except one, in the possession of Pioneer News.

On March 18, 1949, more than two years later, Pioneer News brought the suit above mentioned against the telephone company. Respondent judge entered an order for the telephone company to show cause why a mandatory injunction should not be issued compelling it to restore telephone service to the plaintiff. On motion the attorney general was permitted to intervene and he and the telephone company filed separate motions to dismiss on the ground that the Public Service Commission had exclusive primary jurisdiction of the subject of the action. The telephone company also filed its return to the order to show cause.

On April 12, 1949, respondent entered his "finding of facts, conclusions of law, judgment and decree." He stated that "original jurisdiction of this action lies exclusively in the Public Service Commission," and that jurisdiction of the court is foreclosed except to the limited extent of prescribing the behavior of the parties while they await action by the Commission. He stated that the court had such limited jurisdiction because the Commission has no power to enforce temporary or interlocutory relief pending a hearing. He referred to an order of the Commission made in 1945 requiring the telephone company to continue

service to Pioneer News and stated: "The court is aware that the Commission may find circumstances different from those in the case of 1945; but until the Commission does so, and such finding would seem to be within the exclusive jurisdiction of the Commission, the court is of the opinion that plaintiff's telephone service should be restored, and should be continued pending a determination by the Commission." The decree enjoined the telephone company from discontinuing service to Pioneer News until authorized to do so by order of the Commission or until further order of the court.

On April 15, 1949, the Public Service Commission entered an order reciting that the attorney general had called to its attention the order issued by respondent on April 12, 1949; that the action of the telephone company in discontinuing service had not been brought before it by Pioneer News; and authorizing the telephone company to discontinue such service under its tariff heretofore mentioned.

On April 18, 1949, on motion of Pioneer News, respondent entered a further order, calling attention to the order of the Commission on October 4, 1945, by which the telephone company was ordered to continue to furnish service to Pioneer News until discontinued by mutual consent or further order of the Commission. Respondent stated that there had been no application for a rehearing of such order, and that the later order of the Commission, made on April 16, 1949, is void because made ex parte without notice. Respondent ordered that the injunction be kept in force until the further order of the court or until the order of the Commission dated October 4, 1945, be revoked or modified by the Commission in accordance with the statutes.

After unavailing motions, the attorney general filed in the Supreme Court the pending application for prohibition and the same is now at issue.

A great many decisions have been cited. We have examined them, but it will be necessary to discuss only a few of them. The legal correctness of no case cited is questioned by either party, but the parties seriously disagree as to the relevancy of some of the cases to the facts of the instant case.

We agree with the cases cited by respondent as to the general nature of the writ of prohibition. Those cases and many others hold that the writ is not a writ of right, but its issuance in a given case is addressed to the sound discretion of the court. However, the chief purpose of the issuance of the writ by this court is to confine a lower court within its proper jurisdiction; that is, to prevent it from acting without or in excess of its rightful jurisdiction.

We do not agree with respondent's contentions that the writ is improper here either because relator has another adequate remedy or because the act sought to be prohibited has already been performed. Remedy by appeal is unavailable because no final judgment or appealable interlocutory judgment has been rendered [Civil Code, Section 126]. For the same reason certiorari would not avail [State ex rel. Walbridge v. Valliant, 123 Mo. 524, 27 S. W. 379, 28 S. W. 586].

Ordinarily prohibition is preventive, rather than corrective, and issues to restrain the commission of a future act and not to undo an act already performed. Yet there is abundant authority that the remedy is available where a judicial body is proceeding without jurisdiction and some part of its action remains to be performed. If respondent was without jurisdiction to grant the injunction, its enforcement may be prohibited [50 C. J., p. 662, Sec. 18; same, p. 711, Sec. 139; St. Louis, K. & S. Ry. v. Wear, 135 Mo. 230, 36 S. W. 357; Rogers v. Rombauer, 105 Mo. 103, 16 S. W. 695; State ex rel. Ellis v. Elkin, 130 Mo. 90,

30 S. W. 333; State ex rel. Schoenfelder v. Owen, 347 Mo. 1131, 152 S. W. (2d) 60]. In State ex rel. Railway v. Russell, 358 Mo. 1136, 219 S. W. (2d) 340, this court modified an injunction granted by a circuit court. Cases cited by respondent are those in which the act sought to be prohibited had already been fully performed.

Our statutes, Sections 5663-5690, inclusive, vest in the Public Service Commission extensive control over public utilities including telephone companies. Specifically, the Commission, either upon its own motion or upon complaint of an interested party, may determine the reasonableness of rates to be charged and the adequacy of service to be performed by such utilities, and to require such service to be furnished to any person lawfully entitled thereto. The power to determine such matters, in the first instance, is vested exclusively in the Commission and not in the courts [State ex inf. Barker v. K. C. Gas Co., 254 Mo. 515, 163 S. W. 854; State ex rel. Cirese v. Ridge, 345 Mo. 1096, 138 S. W. (2d) 1012; State ex rel. Kansas City Power and Light Company v. Buzard, 350 Mo. 763, 168 S. W. (2d) 1044].

Respondent expressly concedes that exclusive primary jurisdiction is vested in the Commission to determine whether the telephone company is justified in discontinuing service to Pioneer News. But respondent contends that his court has jurisdiction of the subject matter and the parties in the cause pending before it and, as a court of equity, has power by mandatory injunction to place the parties in statu quo until the matter can be heard and determined by the Commission. He further contends that the Commission cannot grant such relief pending its final determination.

The Commission is not a court and has no power to render a judicial decision, but it can sue or be sued. It can resort to the courts to enforce its orders and such

orders can be reviewed by a circuit court of proper venue, to wit, in a county where it holds a hearing or in Cole County where its principal office is located [Section 5690].

The injunction granted by respondent does not place the parties in statu quo as to the conditions which existed at the time the suit was filed. It reaches back more than two years before that time and orders restoration of telephone service which has not been furnished since February, 1947. To do that the order of respondent refers to an order of the Commission made in 1945. By that order the Commission refused to authorize the telephone company to discontinue service to Pioneer News, but neither the Commission nor Pioneer News has ever made any effort to enforce that order although it has not been complied with since February, 1947. Even in its petition in the instant suit, Pioneer News does not mention or rely upon the 1945 order or any other order of the Commission.

As stated, respondent expressly concedes that jurisdiction to finally decide the controversy is vested in the Commission; also that, notwithstanding the 1945 order, changed conditions may or may not justify the telephone company in discontinuing service and that only the Commission, in the first instance, may determine that question. But, until the Commission takes further action, respondent contends that his court has the limited jurisdiction specified in its decree. Cases cited by respondent in support of that contention are not in point. State ex rel. Pub. Serv. Comm. v. Blair, 347 Mo. 220, 146 S. W. (2d) 865, was an original proceeding in this court to prohibit a circuit judge from determining and deciding a suit pending in his court. That suit was brought by a number of drayers and haulers against the Public Service Commission and certain law enforcement officers. Its purpose was to obtain a judgment declaring that the Bus and Truck Act did not apply to their operations and to restrain defendants from attempting to enforce it against them. We sus-

tained plaintiffs' contention that the Act did not apply to them; that the Commission was entirely without jurisdiction to enforce it against them and, of course, could not prohibit the circuit court from acting.

Southern Railway v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429, cited by respondent, was a suit for mandamus by a shipper to compel the railroad to accept a shipment at the rates which had been fixed by the State Railway Commission. The plaintiff prevailed against the defenses that he had another adequate remedy and that the rate was unreasonable. There was no question of venue or jurisdiction in the case and the opinion has no relevancy to the instant case.

State ex rel. Railway v. Russell, 358 Mo. 1136, 219 S. W. (2d) 340, has some similarity to the instant case, but does not sustain respondent's contention. That was an original proceeding in this court to prohibit a circuit court from exercising jurisdiction in a suit by certain employees of the railway to enjoin it from carrying out certain employment practices. We held that original jurisdiction to decide the controversy was vested in the Federal Mediation Board, but that the circuit court had jurisdiction to enjoin the discharge of the plaintiff employees until the Mediation Board could pass upon the matter or for a reasonable time to permit the jurisdiction of the Board to be invoked. There the effect of the temporary injunction was actually to preserve the status quo, that is, to prevent the employees from being discharged until the matter could be considered by the tribunal having jurisdiction. Here the injunction does not preserve the condition existing between the parties at the time of the institution of the suit, but usurps the original jurisdiction of the Commission to determine whether Pioneer News is entitled to a service which it has not had for more than two years before the suit was filed.

Besides, in the instant suit we have a question of venue, as distinguished from jurisdiction, which was not present in the case of State ex rel. v. Russell. Respondent concedes that, notwithstanding the Commission's 1945 order, changed conditions may have justified discontinuance of telephone service in 1947. Whether changed conditions did justify that action, only the Commission has primary jurisdiction to decide. In fact, the Commission attempted to decide that question in its finding and order of April, 1949, wherein it granted to the telephone company permission to discontinue service. But, respondent says the later order of the Commission was made without notice or hearing and is void. We need not decide that question. Pioneer News appearing specially, unsuccessfully, asked the Commission to revoke that order. Under the statutes it could have obtained a speedy review by the circuit court of Cole County. Even if no order had been made by the Commission, its doors were and are open for an application by Pioneer News for restoration of service and it alone has primary jurisdiction of such an application with the right of review by the circuit court of the proper venue, to-wit, Cole County, or, if the hearing is held elsewhere, the county where the matter is heard; and **such court of proper venue** has power to make such orders as equity may authorize.

Respondent says that the telegram from the governor and attorney general did not warrant the telephone company in discontinuing telephone service to Pioneer News, citing Andrews v. Telephone Co., 83 Fed. Supp. 966. In that case the telephone company notified one of its customers that it had been informed by the United States District Attorney that she was using telephone service in aid of gambling operations and that such service would be discontinued on a certain date. The tariff of the telephone company purported to authorize such action upon notice and request of any law enforcement officer. The

customer brought suit in the district court of the District of Columbia praying for a mandatory injunction. In effect, the opinion says that mere notice from a law enforcement officer does not justify a public utility in refusing to furnish service; "to confer what would amount to judicial power on a law enforcement officer and to exercise such power ex parte would be violative of due process of law * * *."

We agree with much that is said in that opinion, but we do not regard it as complete authority for respondents' position in the instant case. No temporary injunction was issued in that case and the question of the primary jurisdiction of the Public Utilities Commission of the District of Columbia was not discussed. The opinion does say, however, "A public utility may refuse, and, in fact, must refuse, service if to its knowledge the service is being used for illegal purposes. This fact must, however, be established."

"The telephone company, for example, may have a right, if it sees fit to do so, to request the United States Attorney to disclose whatever evidence he has in support of the information contained in the notice. The telephone company must make its own decision whether the evidence is sufficient to justify discontinuance of the service."

In the instant case the notice from the governor and attorney general did not amount to a judicial finding of the facts stated therein and did not constitute full and complete authority for the telephone company to discontinue service. But, coming from the chief law enforcement officers of the State, it was not to be ignored or lightly considered. No doubt the telephone company could have applied to the Commission for permission to discontinue service. Apparently it was satisfied that the statements contained in the telegram were true and assumed the responsibility of discontinuing service. The initial

jurisdiction to determine whether the action of the telephone company is legally justified is vested in the Public Service Commission and not in the courts.

Upon the record before us we hold that respondent is without jurisdiction to grant or enforce an injunction and our provisional rule in prohibition must be and is hereby made absolute.

Albert M. Clark, Judge.

All concur.

AUG 9 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 184

JAMES F. NANGLE, Judge of the Circuit Court of the City of St. Louis,
Petitioner,

vs.

STATE OF MISSOURI, at the Relation of J. E. TAYLOR, Attorney General of the State of Missouri,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

JAMES F. NANGLE, Judge of the Circuit Court of the City of St. Louis,
Petitioner,

vs.

STATE OF MISSOURI, at the Relation of J. E. TAYLOR, Attorney General of the State of Missouri,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the court below has not been officially reported in the Missouri Reports, but is reported at 227 S. W. (2d) 655.

JURISDICTION.

Respondent denies that this court has jurisdiction of this cause. Petitioner invokes the jurisdiction of this court under Title 28, U. S. C., Section 1257 (3). For reasons fully set out in respondent's argument at pages 3-9,

respondent submits that no jurisdiction is conferred on this court in this cause because the decision of the Missouri Supreme Court involved no substantial question under the Constitution of the United States, and for the further reason that constitutional questions relied upon by petitioner were either not timely raised before the Missouri Supreme Court or were not raised at all in that court.

QUESTION PRESENTED.

Respondent does not consider that any federal question is presented in this cause. However, if any is presented, respondent submits that petitioner's statement of such question does not correctly present the federal matter involved. If any federal question is presented, respondent submits that it is the following:

Does the decision of the Supreme Court of Missouri in this case, by holding that exclusive jurisdiction of the matters involved is in the Public Service Commission of Missouri and that the petitioner has no jurisdiction or venue in this cause, have the effect of leaving Pioneer News Service without any adequate remedy and so deprive it of property without due process of law?

SUMMARY STATEMENT.

The summary statement of petitioner is satisfactory, and the respondent adopts said summary statement.

ARGUMENT.

I.

This court does not have jurisdiction to review this cause on certiorari.

Petitioner invokes the jurisdiction of this court under Title 28, U. S. C., Section 1257 (3). Respondent submits that this court does not, under such provisions, have jurisdiction of this cause.

The action involved is an original proceeding in prohibition in the Missouri Supreme Court. The sole issue presented to and decided by the Missouri Supreme Court was whether or not, under the laws of the State of Missouri, the Circuit Court of the City of St. Louis, Missouri, had jurisdiction to issue a temporary mandatory injunction to compel the Southwestern Bell Telephone Company, a public utility, to restore telephone service to a subscriber, Pioneer News Service, Inc., two years after such service had been discontinued by the telephone company pursuant to a tariff regulation filed by it with the Missouri Public Service Commission. In the return to the preliminary rule in prohibition (R. 67) no questions involving the Constitution of the United States were raised. The opinion of the Supreme Court of Missouri (R. 82) shows clearly that the matter was determined by that court solely on the basis of the laws of Missouri. Questions involving the Constitution of the United States were raised for the first time in the Missouri Supreme Court upon the motion for rehearing filed in said court (R. 89). In Point III of the motion for rehearing (R. 96) the argument was advanced that the decision of the Missouri Supreme Court deprived Pioneer News Service of any right to temporary relief and "would in effect operate to permit the said Pioneer News Service,

Inc., to be deprived of its property in wanton disregard of the Fourteenth Amendment of the Constitution of the United States" (R. 97). In Point IV of the motion for rehearing the argument was made that the court in its opinion failed to consider the validity of an order of the Missouri Public Service Commission, dated April 15, 1949, which was asserted to be void under the "due process clause" of the Federal Constitution because of lack of notice and opportunity for hearing (R. 100). In Point VI of the motion for rehearing the assertion was made that the court in its opinion "overlooked the Fourteenth Amendment to the Constitution of the United States" in failing to pass upon the validity of the Missouri Public Service Commission's order of April 15, 1949, in the light of the assertion that said order by its very terms deprived Pioneer News Service of any right to appeal from such order (R. 102).

The foregoing are the only claims of right or privilege under the Constitution of the United States which were presented to the Supreme Court of Missouri. None were, it is submitted, essential to the decision of the cause by the Missouri Supreme Court and, therefore, no substantial federal question is presented to this court. The essential ruling of the Missouri Supreme Court is found in its statement in its opinion (R. 89):

> "The **initial** jurisdiction to determine whether the action of the telephone company is legally justified is vested in the Public Service Commission and not in the courts."

In effect the court held that, under the laws of the State of Missouri, the Pioneer News Service in resorting to the Circuit Court of the City of St. Louis had chosen the improper forum for obtaining the relief sought. Such ruling, we submit, involves no substantial federal question.

The situation here presented is quite similar to that involved in Copperweld Steel Company v. Industrial Commission of Ohio, 324 U. S. 780. In that case an employer sought to contest the validity under the Federal Constitution of provisions of the Ohio Workmen's Compensation Law. The action was an original proceeding instituted in the Ohio Supreme Court. This court discussed the Ohio Supreme Court's view of the action as follows (324 U. S., l. c. 783):

> "* * * Treating the petition as one for a writ of prohibition, the court held that remedy unavailable to control the action of the Commission in rendering awards. If considered as an application for mandamus, the court found that the provisions of the workmen's compensation law precluded the issuance of the writ. Construing the prayer as one for injunction, the court held that the law of Ohio invested it with no original jurisdiction in equity, and that general equity jurisdiction is conferred on the Courts of Common Pleas of the State. These are all rulings as to the law of Ohio, and as such, we are without power to review them."

This Court, in discussing the question, stated at 324 U. S., l. c. 784:

> "* * * For it is stated, without contradiction, that there are courts in the State having general equity jurisdiction, and if resort to a defense at law involves the perils and penalties the appellate asserts, we are not advised that equity will not consider an application for relief. Certainly we can neither require the Supreme Court to exercise a jurisdiction it finds is not conferred upon it by law, nor express any view as to the relief to which the appellant may be entitled, in advance of its availing itself of a forum

apparently not foreclosed to it for the protection of its asserted constitutional rights."

This Court concluded as follows at 324 U. S., l. c. 785:

"* * * Inasmuch as we conclude that decision was grounded upon the view that the appellant had not pursued the remedy afforded by state law for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal and deny certiorari."

In the present case the Supreme Court of Missouri has held that Pioneer News Service failed to pursue the remedy afforded by state law. This being the case, the situation is the same as that presented by the Copperweld case, and no federal question is presented for decision of this Court.

A quite similar question was presented to this Court in the case of Phyle v. Duffy, 334 U. S. 431. In that case the petitioner presented the question of the validity under the Constitution of the United States of certain provisions of California law relative to sanity restoration. The question was sought to be raised in a habeas corpus proceeding. This Court held that, under the law of California, the remedy available to the petitioner was mandamus rather than habeas corpus. This Court concluded that there was no federal question presented which was ripe for decision and dismissed the writ of certiorari.

In the present case petitioner has raised, in the motion for rehearing before the Missouri Supreme Court and in the petition and brief filed in this court, questions concerning the validity under the Federal Constitution of procedure under the Missouri law to obtain restoration of telephone service. The Missouri Supreme Court determined that the remedy originally sought was not the

proper one under the laws of that state. No substantial federal question is presented by such decision and, therefore, this Court is without jurisdiction of the cause.

As pointed out above, no question involving the Federal Constitution was presented originally in the Missouri Supreme Court. The return to the preliminary rule in prohibition raised matters involving only Missouri law. The federal constitutional questions were first introduced on motion for rehearing before the Missouri Supreme Court. This Court has held on numerous occasions that such time is too late to raise such questions to confer jurisdiction on this Court. American Surety Co. v. Baldwin, 287 U. S. 156; Bobb v. Jamison, 155 U. S. 416; Kansas City Star Co. v. Julian, 215 U. S. 589.

The petitioner has also sought to raise, for the first time in this court, matters involving the Federal Constitution, which were in no manner presented to, or decided by, the Missouri Supreme Court. In the statement of questions presented (Petitioner's brief, page 13), he includes matters involving the validity of the tariff regulation under which Southwestern Bell Telephone Company had terminated telephone service to Pioneer News Service, Inc. However, there was no question raised before the Missouri Supreme Court involving the validity under the Federal Constitution of such regulation. He also states that questions involving deprivation of equal protection of the laws are presented. However, such questions were never presented to or passed upon by the Missouri Supreme Court. A considerable portion of the argument in the petitioner's brief is addressed to the matter of equal protection of the laws, but inasmuch as such question was not presented to the Missouri Supreme Court, it cannot now be raised for the first time and become the basis of jurisdiction of this court. Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 633; Dewey v. City of Des

Moines, 173 U. S. 193, 198; Wilson v. Cook, 327 U. S. 474, 483.

Even if any Federal constitutional question had been properly presented to the Missouri Supreme Court, the decision of that court is properly based on purely local law without regard for any federal question. The Missouri Supreme Court in its opinion pointed out that the action in the St. Louis Circuit Court had been instituted more than two years after the removal of telephone service by the Southwestern Bell Telephone Company (R. 83). In its opinion it specifically referred to the fact that "the injunction granted by respondent (petitioner) does not place the parties in status quo as to the conditions which existed at the time the suit was filed. It reaches back more than two years before that time and orders restoration of telephone service which had not been furnished since February 1947" (R. 86).

Under Missouri law the role of temporary injunctive relief is the preservation of the status quo pending determination of the rights of the parties. In the case of State on inf. McKittrick v. American Insurance Company, 351 Mo. 392, l. c. 394, 173 S. W. (2d) 51, the Missouri Supreme Court stated: "Ordinarily the sole object of a temporary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made to maintain the existing condition or status until the controversy is decided."

In the present case, as the Missouri Supreme Court pointed out, the injunction granted by petitioner did not have the effect of preserving the status quo of the parties. Thus, under Missouri law no cause of action for injunctive relief was stated in the proceedings before the petitioner. Under Missouri law prohibition will lie to stop the issuance of an injunction where the facts stated in the petition do

not state a case belonging to a class in which courts of equity are authorized to grant injunctive relief. State ex rel. Kenamore v. Wood, 155 Mo. 425, 56 S. W. 474.

The decision in this case being based on adequate state grounds, no jurisdiction is vested in this court regardless of what federal questions might have been raised in the Missouri Supreme Court. McGoldrick v. Gulf Oil Corporation, 309 U. S. 2; Holley v. Lawrence, 317 U. S. 518.

Therefore, respondent submits that this court does not have jurisdiction to review this cause on certiorari, for the reason that no substantial question involving the Constitution of the United States was presented to or decided by the Missouri Supreme Court and that such questions as are attempted to be raised by the petitioner were either not timely raised in the Missouri Supreme Court or were not presented to that court whatsoever, and for the further reason that the decision of the Missouri Supreme Court rests on adequate local grounds.

II.

The only question presented on review of a decision of a state supreme court in a prohibition proceeding is whether court erred in deciding federal questions respecting jurisdiction.

Preliminary to a discussion on the merits and answer on the merits of the questions presented in the petition, and the argument in support thereof, the respondent wishes to call the court's attention to the fact that certain questions, or parts thereof, are not in issue.

As has been stated, the decision of the Supreme Court of Missouri, to which this petition for writ of certiorari is directed, was one involving a writ of prohibition. The province of such a writ in Missouri is to reach a court

which is acting without jurisdiction or is attempting to act in excess of its jurisdiction. Section 1773, R. S. Mo. 1939; State ex rel. Kansas City Public Service Co. v. Waltner, 350 Mo. 1021, 169 S. W. (2d) 697; State ex rel. Atchison, Topeka and Santa Fe Railway Co. v. Trimble, 254 Mo. 542, 163 S. W. 860; State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191. Therefore, the only question which the Supreme Court of Missouri properly had before it in such proceeding was whether the petitioner had any jurisdiction in the matter, or if he did, whether he was acting in excess of his jurisdiction. The court held that the petitioner had no jurisdiction in the premises because the exclusive primary jurisdiction was vested in the Public Service Commission of Missouri. Because of the nature of the proceedings this court should restrict its review to the question of whether the decision of the court, that the petitioner had no jurisdiction, violates the Constitution of the United States. This view is set forth in Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 284 U. S. 8, which involved an appeal from a District Court of Appeal of the State of California which had denied an application for a writ of prohibition against a Superior Court which had granted an injunction. This court said, in speaking of the prohibition suit:

> "* * * That judgment, however, merely dealt with the jurisdiction of the Superior Court of the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. Moreover, with all questions of fact, or with questions of law which would appropriately be raised upon the facts adduced in the trial of the case in the Superior Court, as a court competent to entertain the suit, we are not concerned on this appeal. * * *"

This court further pointed out that even though the pleadings in the injunction suit and the affidavits presented on the hearing of the application of the preliminary injunction were attached to the petition in the prohibition proceedings, still the opinion of the appellate court could not be held to determine the facts or the law as addressed to the facts, which could properly be determined by the trial court only. Mr. Justice Hughes, in conclusion upon this point, said at l. c. (S. Ct.) 106:

> "It follows that, in considering and deciding federal questions in the prohibition proceeding, the District Court of Appeal must be regarded, as its opinion imports, as having determined merely that the statute was valid upon its face so that the Superior Court had jurisdiction to entertain the injunction suit. It is that determination alone that we can now consider."

This holding was approved in Rescue Army v. Municipal Court of Los Angeles, 331 U. S. 549.

This view is further borne out by the statement in Carter v. People of State of Illinois, 329 U. S. 173, to the effect that "When a defendant, as here, invokes a remedy provided by the State of Illinois the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding."

Therefore, the second, third and fourth questions presented in the petition, which deal with the right of a public utility to discontinue telephone service to a customer upon notification by a law enforcement officer that such service is being used in violation of law, are not at issue in the instant case, and Point III of the petitioner's argument in support of questions 2, 3 and 4 has no application herein.

III.

The decision of the Supreme Court of Missouri does not have the effect of leaving Pioneer News Service, Inc., without adequate remedy for the redress of its grievances, inasmuch as the Missouri Public Service Commission may award such relief as Pioneer News Service, Inc., may be entitled to receive, and therefore the decision does not constitute a deprivation of property without due process.

Petitioner, in Paragraph I of the argument, states that the decision of the Supreme Court of Missouri in this cause has the effect of leaving Pioneer News Service without any adequate remedy for the redress of its grievances and this constitutes a deprivation of property without due process of law. This paragraph seems to take up questions 1, 7, 9 and 10 of the questions presented in the petition. Paragraph I may be broken down into two parts, and the following matters were taken up and discussed:

1. The petitioner has no adequate remedy because the Supreme Court of Missouri ruled that neither the Public Service Commission of Missouri nor a circuit court could issue an interim order pending a hearing before the Public Service Commission.

2. The petitioner has no adequate remedy because any resort to the Public Service Commission of Missouri would be unavailing and useless for the reason that that body has prejudged the matter and is biased and prejudiced.

In taking up the first part we wish to draw the court's attention again to the fact that, as shown by the opinion of the Supreme Court of Missouri, the telephone service to the Pioneer News Service was discontinued on February 7, 1947 (R. 83). If it had complained at that time the question of the right of the Public Service Commission to issue an interim order in order to maintain the

status quo might be pertinent. However, more than two years elapsed before Pioneer News Service took any action for the restoration of the phones. At the time the Pioneer News Service sought the injunction it did not have any telephones. In fact, the petition in the circuit court was for a temporary mandatory injunction, i. e., for the court to restore the telephones to it. A temporary injunction is only for the purpose of maintaining the status quo. State ex rel. Barker v. Assurance Co. of America, 251 Mo. 278, 158 S. W. 640; State on inf. of McKittrick v. American Ins. Co., 351 Mo. 392, 173 S. W. (2d) 51.

For Pioneer News Service to assert that it was deprived of its property because the Public Service Commission has no power to issue an interim order is to beg the question because in March, 1949, it had no property of which to be deprived.

The Missouri Public Service Commission Act sets up a complete and exclusive procedure to be followed by a person who does not have a telephone and has been refused one by the telephone company.

The Pioneer News Service, under the provisions of Sections 5686 to 5691, R. S. Mo. 1939, inclusive, could have filed a complaint with the Public Service Commission and had a hearing upon such complaint. From the decision of the Public Service Commission a right of review to a circuit court is given, which court could issue a supersedeas. Pioneer News Service refused to follow this statutory procedure, but rather asked a court of equity to compel the telephone company to give it service. Further, under Section 5683, R. S. Mo. 1939, it is provided that if any telephone corporation is failing to do anything required of it by law or order of the Commission, then complaint may be made to the Commission and the Commission will direct its general counsel to institute mandamus or injunction proceedings to obtain appropriate re-

lief. This was another statutory procedure which was available to Pioneer News Service under the Public Service Commission Act, and of which it did not take advantage. We believe it is apparent that at the time Pioneer News Service applied for the injunction it had complete and adequate remedy, which remedy afforded it due process of law. Yakus v. United States, 321 U. S. 414; Porter v. Investors Syndicate, 286 U. S. 461; Pacific Livestock Co. v. Lewis, 241 U. S. 440.

However, it seems petitioner relies upon an order made in 1945 by the Public Service Commission, which order was to the effect that the telephone company should continue the service to Pioneer News Service "until such time as complainant may voluntarily relinquish the service or if on another and similar proceeding it may be shown that the company is justified in discontinuing the service because of unlawful use."

Petitioner contends that he has the right to issue a temporary mandatory injunction until the Commission takes further action, which injunction is to date back to 1947 (when the telephones were removed) and restore the parties to their status as of that time. He states that if he does not have such right then Pioneer News Service has no remedy whatsoever because "the state Supreme Court has stated that although the Commission itself may not grant equitable or interlocutory relief pending a determination of any matter before it." (Petitioner's brief, page 29.)

Respondent is unable to find any statement in the opinion which so states. In fact, the petitioner, in his motion for rehearing, says:

> "The Court overlooked and failed to pass upon the question raised in Respondent's Brief in regard to the fact that the Missouri Public Service Commission is without the power to issue any temporary relief pend-

ing determination of any final decision of a matter before it."

The court, in its opinion, did state:

"But respondent contends that his court has jurisdiction of the subject matter and the parties in the cause pending before it and, as a court of equity, has power by mandatory injunction to place the parties in statu-quo until the matter can be heard and determined by the Commission. He further contends that the Commission cannot grant such relief pending its final determination.

"The Commission is not a court and has no power to render a judicial decision, but it can sue or be sued. It can resort to the courts to enforce its orders and such orders can be reviewed by a circuit court of proper venue, to wit, in a county where it holds a hearing or in Cole County where its principal office is located. (Section 5690.)"

However, we believe it is apparent that the clause which states that the Commission "has no power to render a judicial decision" does not mean that the Commission has no right to issue an interim order, in view of the clause following, which states that the Commission "can sue or be sued," said second clause having no relation or connection to the first, if the first clause is given the interpretation placed upon it by the petitioner. We believe it is apparent that the second paragraph is merely an exposition and statement of the powers of the Public Service Commission which is set forth at the beginning of the discussion by the court of the case on the merits. Therefore, the question of whether the Commission had the right to issue an interim order was not discussed or passed upon in the opinion of the court below.

The Missouri Public Service Commission has recognized its right to issue interim orders and has exercised the